Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

GLADSTONE MESSAM,

Petitioner,

vs.

WILLIS MORTON, SUPERINTENDENT OF THE NEW JERSEY STATE PRISON, AND THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state appellate court's findings of fact regarding what arguments have been presented by a trial counsel constitute a determination of a "subsidiary fact" that must be presumed correct pursuant to 28 U.S.C. § 2254(d) by federal courts when reviewing habeas corpus claims based on ineffective assistance of counsel?

2. Whether, under certain circumstances, *Miranda* warnings are a prerequisite to the validity of a consent to search obtained during a custodial interrogation?

3. Whether the Court of Appeals misinterpreted the record in concluding that the alleged ineffectiveness of counsel was not prejudicial to Petitioner and that such ineffectiveness did not prejudice him and render his trial unfair?

PARTIES TO THE PROCEEDINGS

Petitioner in the Court (petitioner in the District Court and appellant in the Court of Appeals) is Gladstone Messam. Respondents in this Court (respondents in the District Court and appellees in the Court of Appeals) are Willis Morton, Superintendent of the New Jersey State Prison, and The Attorney General Of The State Of New Jersey.

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Petitioner, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 19, 1997, affirming the decision of the District Court of New Jersey that was filed on July 31, 1996.

OPINIONS BELOW

The opinion of the District Court of New Jersey ("District Court") (App. F. at 33a-51a) was not reported. The opinion of the United States Court of Appeals for the Third Circuit ("Court of Appeals") affirming the District Court's decision (App. A at 1a-23a) was not reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 19, 1997 (App. B at 24a-25a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated. . . ."

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in relevant part that no state "shall deprive any person of

life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 of the United States Code (1995), § 2254 provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> * * *
>
> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the fact-finding procedure

employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record; . . .

* * *

STATEMENT OF THE CASE

Petitioner Gladstone Messam has been incarcerated in Trenton State Prison since 1989, convicted of a murder, in violation of the Sixth and Fourteenth Amendments of the United States

Constitution. At the time of his arrest, Petitioner was a college-educated businessman who owned several sandwich shops, had no previous arrests, and worked seven days a week to support his family. While working at one of his sandwich shops, he was confronted by police and coaxed down to the police station, where the police proceeded illegally to interrogate him and search his personal property. Petitioner's trial counsel failed to take the steps necessary to correct these illegal actions, and failed to protect Petitioner's rights in other ways as well. As a consequence, Petitioner now faces life in prison.

This is a murder case built entirely upon circumstantial evidence; three instances of critical error by trial counsel constituted ineffectiveness of counsel in violation of the Sixth Amendment and resulted in the introduction of damaging circumstantial evidence. Trial counsel's failure to argue properly violation of Petitioner's Fourth Amendment rights, failure to move to suppress damaging oral statements allegedly made by Petitioner at the stationhouse ("stationhouse statements"), and inappropriate witness examination causing the admission of pivotal hearsay statements, individually, and/or collectively, deprived Petitioner of a fair trial. Trial counsel's errors cannot be explained by any sound trial strategy and constitute grounds to grant Petitioner's request for habeas corpus relief.

In the context of these errors, this case presents the Court with an opportunity to address three separate questions. These questions, as set forth in the Questions Presented, *supra*, present two questions which have never been addressed by this Court. The first question is whether a state court's findings of fact regarding what arguments have been made by trial counsel constitute "subsidiary facts," thereby warranting deference by the federal courts. The second question is whether, under certain circumstances, *Miranda* warnings are a prerequisite to the validity of a consent to search obtained during a custodial interrogation.

A. Statement Of Facts

On September 24, 1984, Detective Gary Miller of the Newark Police Department's Homicide Squad responded to a call at 85

South Orange Avenue. In a vacant building, Miller found the body of a female whom someone had stabbed repeatedly in the chest, neck, hands, and face. The next day, Mary Magdelene Daye ("Mrs. Daye") reported that she had not seen her daughter, Rhonda, for several days, and was brought by two police officers to Detective Miller. Mrs. Daye subsequently confirmed that her daughter was the victim of the stabbing.

At the time, Petitioner owned a Subway sandwich shop in Newark and a Big Bite sandwich shop in Orange, New Jersey. He also owned and operated a tractor and trailer. He built these successful businesses from the ground up, having come from Jamaica with nothing more than a college education. He supported his family with the proceeds from the businesses.

Rhonda Daye ("Ms. Daye") worked at both of Petitioner's stores. When Detective Miller searched her apartment, he found a note that Ms. Daye had addressed to Petitioner's wife. The note stated that Petitioner and Ms. Daye were having an affair, and that Ms. Daye was pregnant with his child. The police interviewed Mrs. Daye and the victim's cousin, Beverly Jones, on September 25, 1984. Mrs. Daye corroborated the relationship between Petitioner and her daughter. Mrs. Daye told the police that her daughter had told her that she was pregnant by Petitioner. Ms. Jones confirmed that Ms. Daye was pregnant and also that Petitioner had apparently wanted Ms. Daye to have an abortion. According to Ms. Jones, Ms. Daye had expressed to her that she did not want an abortion. She also recalled that Ms. Daye had relayed the details of a conversation with Petitioner in which he had allegedly warned Ms. Daye that "he would get the baby out of her one way or another." (*See* App. A at 2a-3a).

After interviewing both women, Detective Miller and Detective Charles Whitner traveled to the Subway store to interview Petitioner. As the trial judge concluded, at this point the Petitioner was a "suspect." (*See* App. L at 84a-85a). Nevertheless, when questioning Petitioner, the Detectives did not mention that Ms. Daye was dead nor that they had recovered her body; instead, they indicated simply that the victim was missing. After Petitioner told the Detectives

that he had not seen Ms. Daye since Friday, the Detectives asked Petitioner if he would accompany them to the police station and provide a statement. Petitioner agreed (*See* App. A at 3a).

Petitioner asked if he could drive to the police station because he had double-parked his wife's car in front of his store. Detective Miller agreed, but asked that he ride with Petitioner. After unlocking the passenger door from the outside, Petitioner bent over to make room by moving some papers from the front passenger seat to the rear. At that time, Detective Miller noticed what appeared to be blood spots on the pile of papers. (*See* App. A at 3a).

After they arrived at the police station and *before* Detective Miller had informed Petitioner of his *Miranda* rights, Detective Miller interrogated Petitioner. At that point, Detective Miller was aware that: (1) Petitioner allegedly was the father of the victim's baby; (2) Petitioner allegedly wanted the victim to have an abortion; (3) the victim allegedly refused to have an abortion; (4) Petitioner allegedly threatened to "get the baby out of her one way or another;" (5) the victim had intended to inform Petitioner's wife that the victim was pregnant by him; and (6) that blood spots appeared on the papers in the car Petitioner was driving. Despite this evidence, Detective Miller proceeded to interrogate Petitioner without informing him of his *Miranda* rights. (*See* App. A at 3a).

In the course of the interrogation, Petitioner stated that he had last seen Ms. Daye the previous Friday, that Ms. Daye had worked for him until her pregnancy forced her to stop working, that she had claimed that Petitioner was responsible for her pregnancy, and that he did not know about the blood-stained papers in the car. Detective Miller also asked who else had driven that car since the previous Thursday. Although the car belonged to Petitioner's wife, Pearl Messam, and although Petitioner's brother had access to the car, Petitioner allegedly stated that he had been the only person to use the car between Thursday, September 20, 1984 — the day before Ms. Daye had last been seen — and Tuesday, September 25, 1984 — the day of the interrogation. (*See* App. A at 3a).

Following the *Mirandaless* interrogation, Detective Miller asked for Petitioner's consent to search the car. Petitioner consented.

The search produced twelve pieces of blood-stained business papers, and two mugs with blood on them. After the search, the Detectives returned to interrogate Petitioner further and noticed what appeared to be blood stains on Petitioner's work boots. At that point, the Detectives finally advised Petitioner of his Fifth Amendment *Miranda* rights and Petitioner immediately invoked them. (*See* App. A at 3a-4a).

Tests performed later at the State Police Laboratory indicated that the blood on the boots, on the papers, on the tire of the car, and on one of the mugs (the "Yorkie" mug) were of human origin. Further enzyme analysis revealed that blood found on the Yorkie mug contained a combination of enzymes that was consistent with Ms. Daye's enzymes but not with Petitioner's enzymes. The State's forensic expert testified at trial that 3.8% of the African-American population had the combination of enzymes and phenotypes common to Ms. Daye's blood and the blood found on the Yorkie mug. (*See* App. I at 62a; 3rd page of Lodging App.).

In a pre-trial motion, Petitioner moved to suppress the physical evidence seized from his wife's car. During the suppression hearing, Robert Brown, Esq., Petitioner's trial counsel ("trial counsel") placed great emphasis on the failure of the Newark police to read Petitioner his *Miranda* rights before seeking his consent to search. Judge Degnan agreed to suppress most of the items seized from the car. In so doing, he evaluated "the entirety of the circumstances" before determining that the search was improper under the Fourth Amendment. He reasoned that the Police Department's failure to recite the *Miranda* warning and to disclose to Petitioner what they knew about him, rendered his consent involuntary and the search unconstitutional because once the Detective saw the blood stains on the papers in the car, a custodial setting had arisen. ("There's no question at that point based on all these things on the totality of the circumstances the police had a right to make an arrest at that time and I seriously doubt that Mr. Messam was free to leave at that time so it was tantamount to a custodial setting at that particular time.") (*See* App. L at 84a-85a). Accordingly, Judge Degnan ruled that all evidence obtained after Detective Miller saw the blood-spotted papers and before Petitioner was *Mirandized* should be

suppressed; however, he allowed some of the blood-stained papers into evidence because Detective Miller asserted that he had spotted them while they were in plain view. In addition, the trial court also admitted Petitioner's work boots as the products of a search incident to arrest.

Significantly, Petitioner's alleged statement that no one else had driven the car since the Thursday before the murder except Petitioner also fell within that time period. Nonetheless, as a direct result of trial counsel's ineffectiveness, Judge Degnan did not exclude these stationhouse statements. In a bizarre exchange, Petitioner's counsel declined Judge Degnan's *offer* to exclude that critical evidence. Judge Degnan stated:

> [Petitioner] should have been *Mirandized* . . . after the Officer saw those papers before any further questioning took place and if there was a request to strike any of those statements that he made, I would bar those things from being admitted.

After the Court ruled on the physical evidence, the State sought to clarify for purposes of appeal whether the ruling applied to the stationhouse statements. Judge Degnan basically granted Mr. Brown the option to exclude the statements. When the Court directly asked whether he was requesting the suppression of the statements, Mr. Brown equivocated. As trial counsel, Mr. Brown explained that he would like to help the prosecution package its appeal, but that he could not decide whether to suppress the statements. In language that would engender confusion later in the proceedings, he stated,

> I'd like to help [Assistant Essex County Prosecutor] Bogdanski as best I can but it's impossible. . . . I would like to say Mr. Bogdanski now fine, they can be admitted and my obligation as a lawyer I see as the case goes on it's better to keep them out but I think the record is complete enough for Mr. Bogdanski to make those arguments [on appeal] as to those statements.

Judge Degnan agreed that the Appellate Division could rule on the admissibility of the stationhouse statements based on his comments on the subject.

Finding specifically that Judge Degnan had based his suppression ruling on the absence of a *Miranda* warning and that trial counsel had offered nothing more on appeal, the Appellate Division reversed Judge Degnan's order. The Appellate Division held that "a *Miranda* warning is not a constitutional prerequisite to the validity of a consent to search." (App. K at 73a). Significantly, the Appellate Division concluded that: "From our study of the transcript we are satisfied that defendant offered nothing beyond the absence of *Miranda* warnings to support any claim that his consent was involuntary." (App. K at 75a). The opinion of the Appellate Division did not discuss the admissibility of the stationhouse statements and the Appellate Division ultimately denied the motion for reconsideration on May 21, 1987. (App. J at 68a-69a). The Appellate Division stated that Petitioner had not requested suppression of the oral statements at the suppression hearing and that the Order under review applied only to the physical evidence. (App. J at 69a). The New Jersey Supreme Court refused to consider Petitioner's request for leave to appeal because trial counsel had filed it more than a month late.

Aside from the admission of the stationhouse statements and the evidence seized from the car, the only other trial evidence germane to this Petition is the hearsay testimony of Beverly Jones. During the trial, the State was allowed to elicit from Ms. Jones that Petitioner had allegedly threatened to "get the baby out of [Ms. Daye] one way or another," even though Ms. Jones had heard about this conversation second-hand from the victim. Judge Degnan ruled that Mr. Brown had opened the door to this testimony by asking the witness about a fight between Ms. Daye and Petitioner that had preceded that alleged statement. (*See* App. A at 5a). Petitioner was eventually convicted of murder by a jury and sentenced to life imprisonment with 30 years of parole ineligibility. (App. A at 5a).

Petitioner now appeals the denial of his application for a writ of habeas corpus. Before the District Court and Court of Appeals, Petitioner had contended that the following three key errors committed by his trial counsel had cost him his freedom: (1) trial counsel was unfamiliar with or disregarded the basic rules of law

surrounding consensual searches; (2) trial counsel failed to accept the trial judge's express offer to suppress damaging oral testimony; and (3) trial counsel invited into evidence otherwise inadmissible hearsay that constituted critical circumstantial evidence. Rather than consider whether the latter two shortcomings were errors by trial counsel, the Court of Appeals determined, as did the District Court, that Petitioner was not prejudiced because other "substantial evidence existed" as to his guilt.

B. Procedural History

In a pre-trial motion before Petitioner's murder trial, his trial counsel moved to suppress the physical evidence seized from his wife's car. His trial counsel placed great emphasis during the suppression hearing on the failure of the Newark police to read Petitioner his *Miranda* rights before seeking consent for their search. He succeeded in persuading the Honorable Michael J. Degnan, J.S.C., to suppress most of the items seized from the car on the basis that the Police Department's failure to recite the *Miranda* warning rendered his consent involuntary and the search unconstitutional. The State immediately requested a stay of the trial date pending a motion for leave to appeal. Judge Degnan granted the stay, and the Appellate Division granted leave to appeal.

Finding that Judge Degnan had based his suppression ruling on the absence of a *Miranda* warning, the New Jersey Superior Court, Appellate Division ("Appellate Division") reversed Judge Degnan's order. The Appellate Division held that "a *Miranda* warning is not a constitutional prerequisite to the validity of a consent to search." (App. K at 73a). The Appellate Division concluded that: "From our study of the transcript we are satisfied that defendant offered nothing beyond the absence of *Miranda* warnings to support any claim that his consent was involuntary." (App. K at 75a).

Petitioner then sought leave to appeal to the New Jersey Supreme Court. In the meantime, however, the State moved in the Appellate Division for reconsideration *nunc pro tunc*. The State submitted that the Appellate Division had overlooked the issue of the admissibility of the stationhouse statements. The Clerk of the

Supreme Court dismissed Petitioner's interlocutory motion because of the pendency of the State's motion for reconsideration. The Appellate Division ultimately denied the motion for reconsideration on May 21, 1987. The Appellate Division held that Petitioner had not requested suppression of the stationhouse statements at the suppression hearing and that the Order under review applied only to the physical evidence. (App. J at 68a-69a).

Petitioner's lawyer then had fifteen days to file a motion for leave to appeal to the New Jersey Supreme Court. Despite the reminder counsel received from the Clerk of the Supreme Court regarding that deadline, Mr. Brown waited 53 days before filing his motion. The Supreme Court refused to consider Petitioner's request for leave to appeal because of untimeliness.

A jury convicted Petitioner of murder, N.J.S.A. 2C:11-3a, unlawful possession of a weapon, N.J.S.A. 2C:39-5, and possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4. Judge Degnan imposed a life sentence, with 30 years of parole ineligibility.

Petitioner appealed his conviction. In a *pro se* supplementary brief, Petitioner argued that Judge Degnan had erred in admitting the hearsay testimony of Beverly Jones; he argued that trial counsel's performance during the interlocutory appeal phase of the proceedings deprived him of constitutionally-guaranteed effective assistance of counsel; and he claimed that the admission of the stationhouse statements violated his rights under the Fifth and Fourteenth Amendments.

The Appellate Division rejected Petitioner's arguments. (App. I at 54a-67a). The Court summarily concluded that even if counsel had been ineffective during the interlocutory appeal phase, a more effective lawyer would not have won the appeal. (App. I at 65a) The Appellate Division also affirmed Judge Degnan's ruling that Mr. Brown had opened the door to the hearsay testimony of Ms. Jones. (App. I at 65a-67a). The Supreme Court of New Jersey denied Petitioner's petition for certification. (App. H at 53a-54a).

Petitioner next applied to the trial court for post-conviction relief pursuant to New Jersey Code of Criminal Justice Rule 3:22. Petitioner challenged the effectiveness of his counsel on direct

appeal and attacked the Appellate Division's handling of his Fourth Amendment claims. The trial court denied post-conviction relief in an order dated March 26, 1993. The Appellate Division affirmed Judge Degnan's denial without discussing the ineffectiveness of Petitioner's counsel. The New Jersey Supreme Court denied Petitioner's request for certification.

Petitioner then applied to the District Court for a writ of habeas corpus. In a twenty-one page opinion, issued on July 31, 1996, the Honorable Alfred M. Wolin, U.S.D.J., denied the application. (App. F at 33a-51a; App. G at 52a). Petitioner then requested a Certificate of Appealability/Probable Cause to appeal that Order. By Order dated August 27, 1996, Judge Wolin issued a Certificate of Appealability/Probable Cause. (App. E at 31a-32a). Respondents then moved before the Court of Appeals of the Third Circuit to vacate the Order issuing the Certificate on a number of bases.

By Order dated February 18, 1997, the Court of Appeals vacated Judge Wolin's Order, remanded for compliance with the requirement of 28 U.S.C. § 2253(c)(3) that the Certificate of Appealability indicate which specific issue or issues satisfies the § 2253(c)(2) standard, and retained jurisdiction. (App. D at 29a-30a). By Order dated March 20, 1997, the District Court issued a more-detailed Certificate of Appealability. (App. C at 26a-28a).

The Court of Appeals for the Third Circuit heard oral argument on October 16, 1997. On November 19, 1997, the Court of Appeals issued an opinion affirming the District Court's denial of Petitioner's application for a writ of habeas corpus. (App. A at 1a-23a; App. B at 24a-25a).

C. Exhaustion Of State Remedies

Petitioner recognizes that a state prisoner may initiate a petition for a writ of habeas corpus " '[o]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated.' " *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986) (quoting *Picard v. Connor*, 404 U.S. 270, 276 (1971)).

Petitioner has presented the New Jersey State Courts with the

opportunity to hear each of his three separate Sixth Amendment claims.

Petitioner asserted during the direct appeal of his conviction, and in his subsequent petition for certification to the New Jersey Supreme Court, that counsel's failure to argue the involuntary consent issue improperly deprived him of his right to the effective assistance of counsel.

Petitioner complained of counsel's failure to suppress his non-*Mirandized* oral testimony in his petition for post-conviction relief, in his appeal of the denial of that petition, and in his subsequent petition for certification to the New Jersey Supreme Court.

Finally, Petitioner alleged that his lawyer was ineffective for opening the door to damaging hearsay testimony in his petition for post-conviction relief, in his subsequent appeal, and in the petition for certification to the New Jersey Supreme Court that followed.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS THAT A STATE APPELLATE COURT'S FINDINGS RELATED TO SUBSIDIARY FACTS MUST BE PRESUMED CORRECT BY A FEDERAL COURT UNDER 28 U.S.C. § 2254(d).

Mr. Messam's petition for a writ of certiorari should be granted because the opinion below conflicts with this Court's prior rulings on the presumption of correctness that must be afforded to state court findings of fact in habeas corpus petitions. More importantly, this case presents the Court with an opportunity to rule on whether state court findings of fact regarding what arguments were presented by trial counsel should be considered "subsidiary factual questions," thereby subjecting them to a presumption of correctness. The Court's ruling on this issue will undoubtedly have a significant impact on the vast number of ineffective assistance of counsel claims brought in habeas corpus petitions each year.

A. The Court Of Appeals' Failure To Presume Correct The State Court's Findings Of Fact Raises A Critical Question As To Whether State Court Findings Regarding What Arguments Have Been Presented Are Considered "Subsidiary Facts."

This Court has clearly recognized the principle that 28 U.S.C. § 2254(d) requires federal courts to accord a presumption of correctness to state-court findings of fact in habeas proceedings. *Sumner v. Mata*, 455 U.S. 591, 592, 71 L. Ed. 2d 480, 483 (1982). Furthermore, "the presumption of correctness is equally applicable when a state appellate court, as opposed to a state trial court, makes the findings of fact . . ." *Id.*

Questions of ineffective assistance of counsel present a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Berryman v. Morton*, 100 F.3d 1089, 1095 (3d Cir. 1996); *United States v. Auerbach*, 745 F.2d 1157, 1161 n.3 (8th Cir. 1984); *Neal v. Grammer*, 769 F. Supp. 1523, 1529 (D. Neb. 1991). It follows that "the ultimate question of whether the petitioner received effective assistance of counsel is not subject to the 'presumption of correctness' found in § 2254(d)." *Neal*, 769 F. Supp. at 1529. Notwithstanding determination of the "ultimate question," however, it is well-established by this Court, and others, that underlying "subsidiary factual questions" are still entitled to a presumption of correctness under § 2254(d). *Thompson v. Keohane*, 516 U.S. 99, 133 L. Ed. 2d 383, 393-94 (1995); *Miller v. Fenton*, 474 U.S. 104, 112, 88 L. Ed. 2d 405, 412 (1985); *Marshall v. Lonberger*, 459 U.S. 422, 432, 74 L. Ed. 2d 646, 657 (1983); *Neal*, 769 F. Supp. at 1529.

In *Miller*, this Court reversed and remanded the Court of Appeals' holding that a District Court's denial of a habeas corpus petition was proper. The *Miller* Court held that the voluntariness of a confession is not an issue of fact entitled to the § 2254(d) presumption, but rather, is a legal question that merits independent consideration in a habeas corpus proceeding. *Miller*, 474 U.S. at 112, 88 L. Ed. 2d at 412. As Justice O'Connor opined,

> the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained

> in a manner compatible with the requirements of the Constitution is a matter for independent federal determination.

Id. Significantly, Justice O'Connor was also careful to note that critical "subsidiary factual questions" as to the "ultimate question" are still entitled to the § 2254(d) presumption of correctness:

> To be sure, subsidiary factual questions, such as whether a drug has the properties of a truth serum, id., at 306, or whether in fact the police engaged in the intimidation tactics alleged by the defendant, LaVallee v. Delle Rose, 410 U.S. 690, 693-695, 35 L. Ed. 2d 637, 93 S. Ct. 1203 (1973) (per curiam), are entitled to the § 2254(d) presumption. And the federal habeas courts, should, of course, *give great weight to the considered conclusions of a coequal state judiciary.* Culombe v. Connecticut, 367 U.S. 568, 605, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961) (opinion of Frankfurter, J.).

Id. (emphasis added).

Similarly, in *Marshall*, this Court stated that even in cases in which the ultimate question is one of law, questions of "historical fact" surrounding the ultimate question "are obviously questions of 'fact' governed by the provisions of § 2254(d)." 459 U.S. at 431-432, 74 L. Ed. 2d at 657. In *Marshall*, the central issue focused on the voluntariness of a guilty plea. While the Court held that such a question is one of law, it also pointed out that questions of historical fact surrounding the voluntariness of such a plea are still subject to the § 2254(d) presumption. *Id.* As then-Justice Rehnquist explained:

> In its treatment of the state courts' factual findings, the Court of Appeals failed in at least one major respect to accord those determinations the "high measure of deference," Sumner v. Mata, 455 U.S. 591, 66 L. Ed. 2d 722, 101 S. Ct. 764 (1982), to which they are entitled. This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it

> must conclude that the state court's findings lacked even "fair support" in the record.

Id. at 432, 74 L. Ed. 2d at 657. The Court determined that the Court of Appeals had explicitly ignored previous state court findings regarding the respondent-defendant's credibility as a witness. *Id.* at 433, 74 L. Ed. 2d at 658.

In *Thompson*, in which this Court held that the determination of whether a suspect is "in custody" is a mixed question of law and fact, it was carefully explained that when mixed questions of law and fact are presented, "[t]wo discrete inquiries are essential to the determination." 133 L. Ed. 2d at 394. Justice Ginsburg stated as follows:

> The first inquiry, all agree, is distinctly factual. State-court findings on these scene- and action-setting questions attract a presumption of correctness under 28 U.S.C. § 2254(d) . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts.

Id.

In the present case, the "ultimate question" is whether Petitioner's trial counsel was ineffective. As noted, this is a mixed question of law and fact. *Strickland*, 466 U.S. at 698. The "ultimate question" as to whether trial counsel was ineffective is a question of law. *Id.* Accordingly, "subsidiary factual questions," "historical facts," or, as the Court coined the term in *Thompson*, "what happened facts," which bear upon the application of the law are questions of fact. *Thompson*, 133 L. Ed. 2d at 394; *Miller*, 474 U.S. at 112, 88 L. Ed. 2d at 412; *Marshall*, 459 U.S. at 432, 74 L. Ed. 2d at 657.

Here, the Appellate Division's findings regarding what arguments were presented by trial counsel, both orally and written, were "what happened facts." In other words, the arguments (or lack thereof) presented by trial counsel were part of the "scene- and action-setting questions" surrounding the alleged ineffectiveness. *See Thompson*, 133 L. Ed. 2d at 394. These "subsidiary facts," "historical facts," or "what happened facts"

(whichever term may be most appropriate) were completely disregarded by both the District Court and the Court of Appeals in their respective determinations that Petitioner's trial counsel had not been ineffective. Rather, the record indicates that both Federal Courts, without even mention of § 2254(d), ignored the Appellate Division's findings, opting instead to make their own factual conclusions. In turn, their own factual conclusions were heavily relied upon in the ultimate determinations that Petitioner's counsel was not ineffective. (App. A at 15a-16a; App. F at 44a).

B. The Court of Appeals' Failure To Presume The Subsidiary Facts Correct Has Prevented The Ultimate Question Of Ineffectiveness Of Counsel From Being Decided.

Significantly, the Court of Appeals' (and the District Court's) failure to defer to the Appellate Division's findings of fact raises a question that this Court has never definitively addressed, and which it should now answer in the affirmative. Are factual findings by a state appellate court regarding what arguments were presented by trial counsel, both to the trial court and to the appellate court, considered "subsidiary factual questions" that should be accorded a § 2254(d) presumption of correctness when making an ultimate determination of ineffectiveness of counsel?

After a hearing on the facts, the Appellate Division reversed the trial court's suppression of evidence found in the car on the basis of its determination that Petitioner's consent to search the automobile was voluntary. (*See* App. K at 70a-75a). In reaching this conclusion, the Appellate Division specifically found that "we are satisfied that defendant offered nothing beyond the absence of *Miranda* warnings to support any claim that his consent was involuntary." (App. K at 75a).[1] Both the District Court and the

1. Petitioner asserts that the facts of this case indicate that trial counsel should have presented other factors to demonstrate "involuntariness," such as: (1) Petitioner was in custody at the police station; (2) he was never told he was entitled to consult with an attorney; (3) he was deceived by the detectives as to the true nature of their investigation; (4) he had denied any knowledge as to the origin of the (Cont'd)

Court of Appeals, however, in their respective reviews of Petitioner's claims, failed to accord any deference whatsoever to this conclusive finding. (App. A at 15a; App. F at 44a). In reaching their decisions on the ultimate question of ineffectiveness, both courts failed to address squarely the specific question before it: whether trial counsel's misinterpretation of a basic rule of law, and his resulting failure to present more than one of a number of other critical and existing factors, constitutes ineffective assistance of counsel?

In this case, Petitioner contends that trial counsel's performance represented a departure from prevailing professional norms in that his decision to focus solely on lack of *Miranda* warnings, despite the existence of numerous other factors, violated the basic rule of law announced in *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854 (1973). That case held that "the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion . . . is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. In addition, since *Schneckloth*, numerous federal circuit courts have agreed that while the absence of *Miranda* warnings may be one of a number of factors suggesting involuntary consent, "[t]he absence of *Miranda* warnings is not, however, dispositive of whether an individual voluntarily consented to a search." *United States v. Ritter*, 752 F.2d 435, 439 (9th Cir. 1985). *See also Hubbard v. Jeffes*, 653 F.2d 99, 103-04 (3d Cir. 1981); *United States v. Robinson*, 625 F.2d 1211, 1218 n.10 (5th Cir. 1980); *United States v. Tobin*, 576 F.2d 687, 695 (5th Cir.), *cert. denied*, 439 U.S. 1051, 58 L. Ed. 2d 711, 99 S. Ct. 731 (1978) (all holding that *Miranda* warnings are not a prerequisite to a consent to search).

While a reasonably competent attorney would have mentioned the lack of *Miranda* warnings as one factor suggesting an

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(Cont'd)
blood on his vehicle; (5) he had denied guilt; and (6) he had not been informed of his right to refuse consent. (*See* App. A at 15a-16a; App. F at 44a). However, as the Appellate Division noted, these factors were not argued by trial counsel. (App. K at 75a).

involuntary consent, it was an unreasonable departure from prevailing professional norms for trial counsel to rely solely, as the Appellate Division found it did, on the absence of *Miranda* as a basis for excluding critical physical evidence.

> Where the defense is substantially weakened because of the unawareness on the part of defense counsel of a rule of law basic to the case, the accused is not given the effective representation guaranteed him by the Constitution.

Poe v. United States, 233 F. Supp. 173, 178 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965); *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974). The totality-of-the-circumstances analysis set forth in *Schneckloth* was a basic rule of law in the context of Petitioner's suppression hearing and appeal therefrom. Trial counsel's unawareness of this rule and subsequent failure to present more than the single circumstance relating to the lack of *Miranda* warnings destroyed Petitioner's chances of suppressing the physical evidence.

However, in this case, by opting to revisit the facts to make its own determination that counsel argued more than one factor, both Federal Courts neglected to "give great weight to the considered conclusions of a coequal state judiciary." *See Miller*, 474 U.S. at 112, 88 L. Ed. 2d at 412. More significantly, both courts completely avoided the "ultimate question" of whether a trial counsel's mistaken interpretation of a basic rule of law, and his resulting failure to present a totality-of-the-circumstances argument, constitutes ineffective performance.

In order to answer this question, however, this Court must decide whether the legal arguments presented by trial counsel constitute "subsidiary factual questions" subject to the § 2254(d) presumption of correctness. If so, both the District Court and the Court of Appeals have erred in their failure to apply the presumption of correctness which, in turn, has prevented the "ultimate question" of ineffectiveness from being answered in Petitioner's case. In either event, such a ruling by this Court will provide guidance to the vast number of present and future habeas

corpus petitions claiming ineffective assistance of counsel. For this reason, Mr. Messam's petition for a writ of certiorari should be granted.

II.

THE PETITION SHOULD BE GRANTED BECAUSE CONFUSION CONTINUES TO EXIST REGARDING WHETHER, UNDER CERTAIN CIRCUMSTANCES, *MIRANDA* WARNINGS ARE A PREREQUISITE TO THE VALIDITY OF A CONSENT TO SEARCH OBTAINED IN A CUSTODIAL SETTING. THIS COURT HAS NEVER PROVIDED A DEFINITIVE RULING ON THIS ISSUE.

Mr. Messam's petition for a writ of certiorari should be granted because the facts of this case present evidence that confusion still exists with respect to whether, under certain circumstances, *Miranda* warnings are a prerequisite to the validity of a consent to search obtained during a custodial interrogation. This case provides the Court with an excellent opportunity to provide a definitive answer in a chapter of Fourth Amendment jurisprudence that has remained unanswered for twenty-five years. Indeed, the simple fact that the Appellate Division concluded that trial counsel had mistakenly argued nothing more than the lack of *Miranda* provides persuasive evidence that confusion still exists with respect to the state of the law in the area of consensual searches.

While it is true that a number of federal circuit courts have expressed approval of the notion that *Miranda* warnings are not a prerequisite, but merely one factor, in determining whether a consent to search was voluntarily given, *see, e.g., Ritter*, 752 F.2d at 439; *Hubbard*, 653 F.2d at 103-04; *Robinson*, 625 F.2d at 1218 n.10; *Tobin*, 576 F.2d at 695, this Court has yet to express conclusive approval. Indeed, while these federal courts have taken the lead in carving out what they believe *should* be the rule, at least two states and a leading treatise suggest that *Miranda* warnings, in fact, *might* be a prerequisite to a consent to search obtained during a custodial interrogation. *See Schorr v. State*, 499 P.2d 450, *overruled on other grounds, Rowbotham v. State*, 542 P.2d 610 (Okl. Cir. 1975), *judgment vacated and remanded*, 428 U.S.

907 (1976) (Okl. Crim. App. 1972); *State v. Williams*, 248 Or. 85, 432 P.2d 679 (1967) *overruled in part by, State v. Flores*, 280 Or. 273, 570 P.2d 965 (1977); W. LaFave, *Search & Seizure: A Treatise On The Fourth Amendment*, § 8.2, 634 (2d ed. 1987).[2]

As discussed, *supra*, the *Schneckloth* Court explained that the validity of a purported consent to search was dependent upon the voluntariness of the defendant's consent. Such "voluntariness" is to be determined from the "totality of all the circumstances." *Schneckloth*, 412 U.S. at 227, 36 L. Ed. 2d at 863. However, the Court emphasized that its decision was a narrow one, extending only to situations in which "the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent." *Id.* at 248, 36 L. Ed. 2d at 875.[3]

Later, in *United States v. Watson*, 423 U.S. 411, 46 L. Ed. 2d 598, 96 S. Ct. 820 (1976), the Court extended the totality of the circumstances analysis for voluntariness to situations in which the consent was obtained from a person who was in police custody. However, the Court was very careful to draw a distinction between

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2. Also, in his hornbook on criminal procedure, Lafave, without citing cases, writes:

> [s]ome courts have taken the position that a consent to search given during custodial interrogation must be preceded by *Miranda* warnings because the request to search is a request that the defendant be a witness against himself which he is privileged to refuse under the Fifth Amendment. The prevailing view, however, is to the contrary, on the ground that a consent to search is neither testimonial nor communicative in the Fifth Amendment sense.

W. LaFave & J. Israel, *Criminal Procedure—Constitutional Limitations*, § 2.12(b) at 140 (5th ed. 1993).

3. As LaFave explains, much of the Court's analysis placed emphasis on the noncustodial setting and the Court disposed of the *Miranda* analogy by noting that in *Miranda* the concern was with "the compulsion inherent in custodial surroundings." LaFave, *Search & Seizure*, § 8.2(i) at 686.

on-the-street custody and custody at the police station.[4] Thus, as LaFave stresses, "there is reason to question the extension of *Schneckloth* to instances in which the person giving consent is in the custody of the police." LaFave, *Search & Seizure*, § 8.2(i) at 687. This Court has never gone further than its holding in *Watson*. Consequently, Petitioner urges this Court to consider that the factual setting of this case provides an opportunity for the Court to express a clear and well-reasoned bright-line rule in what has otherwise become a sea of arbitrary and unpredictable conclusions concerning "voluntariness" in a custodial setting.[5]

This case presents the Court with an opportunity to consider circumstances in which the defendant: (1) has been placed in custody; (2) has been brought to the police station; (3) has been interrogated; and (4) in the course of a series of improper testimonial-illiciting questions, has also been asked to consent to a search. With the two critical factors being that the suspect is at the police station and that he is asked to consent to a search during the course of other improper questioning, Petitioner asserts that, in such situations, the line between a testimonial- and non-testimonial-illiciting question is no longer clear or meaningful. The facts of this case demonstrate that Petitioner was in such an extremely coercive situation.

Petitioner respectfully submits that the factual scenario presented herein provides a long-overdue and ideal opportunity for the Court to address confusion that exists with respect to this

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4. The Court took care to note that "[he] was in custody, his consent was given while on a public street, not in the confines of the police station." *Watson*, 423 U.S. at 424, 46 L. Ed. 2d at 609.

5. As LaFave observes: "Because voluntariness proved to be an 'elusive, measureless standard' by which to test confessions, its utility as to consent searches is to be doubted." LaFave, *Search & Seizure*, § 8.2(a) at 636.3. As LaFave explains, much of the Court's analysis placed emphasis on the noncustodial setting and the Court disposed of the *Miranda* analogy by noting that in *Miranda* the concern was with "the compulsion inherent in custodial surroundings." LaFave, *Search & Seizure*, § 8.2(i) at 686.

issue. In this regard, Petitioner also urges that this Court remove an element of the arbitrariness inherent in "voluntariness" determinations by setting forth a clear factual exception to the *Schneckloth* totality of the circumstances analysis.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED IN ITS DETERMINATION THAT THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WERE NOT PREJUDICIAL TO PETITIONER AND DID NOT RENDER HIS TRIAL UNFAIR. THIS ERRONEOUS DETERMINATION WAS THE RESULT OF A CRITICAL MISINTERPRETATION OF THE RECORD.

Finally, Mr. Messam's petition for a writ of certiorari should also be granted because the facts clearly indicate that the Court of Appeals critically misinterpreted the record. This misinterpretation undoubtedly caused the Court of Appeals to make the erroneous determination that Petitioner was not prejudiced by any ineffectiveness on the part of his trial counsel. The Court should grant the petition in order to correct this mistake and to insure that Petitioner obtains a full and fair hearing on the merits of his constitutional claim that he was afforded ineffective assistance of counsel. U.S. Const. Amends. VI, XIV.

In its opinion, the Court of Appeals concluded that all three ineffective assistance of counsel claims did not pass the second prejudice-prong of the two-pronged *Strickland* test. *See Strickland*, 466 U.S. at 687. In response to the first ineffective assistance claim, that trial counsel was ineffective in his disregard for the basic rules of law surrounding consensual searches, the Court of Appeals held that, regardless of whether counsel was ineffective in his disregard for the basic rule of law, Petitioner would not have been prejudiced because the jury would have still been presented "with substantial evidence of [Petitioner's] guilt." (App. A at 20a). With respect to the other two ineffective assistance claims, that trial counsel failed to accept the trial judge's express offer to suppress the stationhouse statements and that he inexcusably invited into evidence otherwise

inadmissible hearsay that constituted critical circumstantial evidence, the Court of Appeals declined to express an opinion as to whether the challenged performance was ineffective. Instead, the Court of Appeals simply held that the Petitioner was not prejudiced for the same reason: because "the jury would still have been presented with the substantial other evidence of Mr. Messam's guilt." (App. A at 22a).

A. Critical Misinterpretation Of The Record Fundamentally Altered The Court Of Appeals' Prejudice Analysis.

The Court of Appeals' mistake in its interpretation of the record with respect to critical blood evidence was pivotal to its conclusion that ample evidence of guilt existed. As stated above, evidence presented by the State at Petitioner's trial established that a blood sample taken from an item, the Yorkie mug, produced a potential link to the victim. Significantly, this blood evidence provided the only reliable link between the victim and the car that Petitioner had been driving immediately prior to his arrest. Blood samples taken from all other pieces of evidence did not establish the same link. However, the District Court and Court of Appeals apparently assumed that the blood on the plain view papers also produced the same results. If not for this mistaken interpretation, neither the District Court nor the Court of Appeals could have found that substantial evidence of guilt existed.

In support of its conclusion, the Court of Appeals identified the "substantial evidence" of guilt as: (1) evidence of motive revealed through Petitioner's confession that he had an affair with Ms. Daye, coupled with the fact that she was pregnant and had written notes to Petitioner's wife informing her of the pregnancy and the affair; (2) Petitioner's blood-stained boots and the expert testimony that the blood was of human origin; (3) *the bloodstained papers from the Honda that were in plain view and the expert testimony that the blood enzymes and phenotypes were consistent with Ms. Daye's blood*; (4) the bloodstained papers bearing the logo of Petitioner's shop that were found near Ms. Daye's body; and (5) expert testimony that Ms. Daye was not killed at the vacant building but rather elsewhere in a physical confrontation, dragged

and dumped into the vacant building (suggesting that Mrs. Messam could not have committed the crime). (App. A at 20a-21a) (emphasis added).

Petitioner submits that only the third piece of evidence, which evidence the Court most heavily relied on, was not what it appeared to be. The Court of Appeals erroneously found that,

> [t]he state's forensic expert testified at trial that only 3.8% of the African-American population has the combination of enzymes common to Ms. Daye and the blood found on the mugs and papers in the Honda.

(App. A at 20a and n.7). The forensic analysis provided the only evidence that reliably linked the victim to the car being driven by Petitioner immediately prior to his arrest.

A closer review of the record, however, indicates that the only blood samples producing the result concerning the percentage analysis were the samples derived from the Yorkie mug, *not the papers*. Specifically, the "Interpretation Of Results," (Third page of Lodging App.), indicates that while the "genetic markers" found in the mug and paper specimens are consistent with those found in Ms. Daye's whole blood, only the "combination of the phenotypes found in Specimen #12 occurs in approximately 1.1% of the Caucasian population and 3.8% of the Black population." As noted in the laboratory reports, (Fifth page of Lodging App.), "Specimen 12" is the Yorkie mug. No indication exists that the blood found on the paper, in any way, is linked to the 3.8% commonality; only the blood found on the mug.

The significance of the prior Courts' errors in this regard cannot be overstated. The only blood evidence reliably linking Ms. Daye to the car was the blood found on the Yorkie mug, which was not in plain view. Thus, the alleged "link" between the blood evidence and Ms. Daye by way of blood analysis should not have been included in the Courts' prejudice analyses. None of the blood derived from the papers in plain view produced any blood samples that contributed to the critical 3.8% link. As the Court of Appeals admitted, it relied heavily on the erroneous belief that the blood-stained papers provided the crucial link ("testimony linking the

blood evidence taken from the Honda to Ms. Daye was weighty") (App. A at 20a and n.7).

B. If Not For Misinterpretation Of The Record, The Court Of Appeals Would Have Determined That Petitioner Had Been Prejudiced.

Petitioner submits that had the Court of Appeals not misinterpreted this critical piece of evidence, more than a reasonable probability exists that but for the wrongful introduction of the physical evidence, a reasonable jury would have acquitted Petitioner. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 2583 (1986). Of the five sources of circumstantial evidence cited by the Court of Appeals, only the first one, evidence of motive, arguably implicates the possibility of Petitioner's involvement in the murder. However, a possible motive alone does not constitute substantial evidence of guilt. The second factor noted by the Court of Appeals, the blood on the boots, also cannot be construed to support the factual conclusion that Petitioner committed the murder. The State's forensic expert was unable to identify the source or the age of the blood. The expert was simply able to identify the boot stains as resulting from blood. Without even approximating the date of the stains or identifying the subpopulation "consistent" with those stains, Petitioner contends that the mere existence of those stains could not reasonably be construed to constitute evidence of guilt.

As emphasized, the third factor, which would have been the most crucial piece of "substantial evidence," is not credible because the Court of Appeals misinterpreted the record. The blood derived from the papers seen in plain view cannot be analyzed to provide a link to Ms. Daye, or more generally, to a subpopulation of African-Americans. Moreover, because the Yorkie mug was not in plain view, and should have been excluded from the prejudice analysis, *there is absolutely no evidence that reliably links Ms. Daye's blood to the car*. Without such evidence, Petitioner submits that a reasonable jury would not have convicted him.

The fourth factor noted by the Court of Appeals, the bloodstained papers bearing the logo of Petitioner's shop that were

found near the victim's body, in no way links Petitioner to the crime. The victim had been an employee of Petitioner's place of business and business records had been stored in the victim's bedroom in an apartment above the business. That the owner of the business, Petitioner, would have had reasons to transport business papers in connection with the murder is implausible and untenable. A more likely scenario is that the murderer, possibly believing the papers to be of some value, removed the papers from the apartment and then decided to discard them at the crime scene upon recognizing that the papers were worthless.

Finally, that Ms. Daye's body was dragged to the vacant building is not inculpatory evidence against the Petitioner. While such evidence might be construed to suggest that Petitioner's wife could not have been the one who actually committed the murder (as the Court of Appeals implies) (*See* App. A at 21a), there is no reason to believe that such evidence incriminates Petitioner. Rather, it simply implies that the murderer may have been a male, or other person physically capable of dragging the victim's body to the vacant building.

But for trial counsel's alleged errors: (1) the critical evidence seized from Petitioner's wife's car (with the exception of the few papers in plain view); (2) the stationhouse statements exclusively linking Petitioner to the car; and (3) the damaging hearsay testimony that Petitioner allegedly told the victim that "he would get the baby out of her one way or another," would have all been excluded. Without such evidence, and left only with a questionable motive and a few blood-stained papers containing blood unidentified as to source or age, Petitioner contends that no reasonable jury could have convicted him. *See Strickland*, 466 U.S. at 694 (stating that petitioner must establish the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

However, because the Court of Appeals mistakenly interpreted the record to include (what it thought was) blood reliably linking the victim and the car to the 3.8% commonality, the prejudice analysis undertaken was clearly erroneous. For this reason, Petitioner

respectfully urges the Court to grant this petition to correct the serious injustice that has occurred and to insure that Petitioner obtains a full and fair hearing on all three of his ineffective-assistance of counsel claims.

CONCLUSION

This case presents questions of exceptional importance bearing on litigated claims of ineffective-assistance-of-counsel and violation of Fourth Amendment rights to be free from unreasonable searches and seizures. An opportunity now exists for the Court to provide guidance in the future course of ineffective-assistance-of-counsel claims in the habeas corpus context. Indeed, in light of § 2254(d)'s significance, application of "subsidiary factual questions" to mixed questions of law and fact, such as whether counsel has been ineffective, provides a substantial basis for determining whether counsel has performed in a sufficient manner. Undoubtedly, resolving whether state court findings concerning what arguments have been presented by counsel constitute "subsidiary factual questions" or not, will have an enormous bearing on the effect of § 2254(d) in resolving ineffective assistance claims.

Along with the important issues raised regarding consensual searches and *Miranda* requirements, this "subsidiary fact" question provides the Court with an excellent opportunity to address and clearly resolve certain issues that will impact the future of these frequently-invoked constitutional rights. In addition, the serious injustice incurred by Petitioner with respect to the misinterpretation affecting the prejudice analyses conducted by the lower Federal Courts provides an excellent factual landscape in which to address all of these important issues.

Accordingly, Petitioner respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED NOVEMBER 19, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5558

GLADSTONE MESSAM,

Appellant,

v.

WILLIS MORTON, Superintendent, N. J. State Prison; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Action No. 95-1800)
District Judge: The Honorable Alfred M. Wolin

Argued October 16, 1997
Before: STAPLETON, ALITO, and SEITZ, *Circuit Judges*

(Opinion filed: November 19, 1997)

OPINION OF THE COURT

ALITO, *Circuit Judge*:

Petitioner Messam alleges that he received ineffective assistance of trial counsel in violation of the Sixth Amendment and asks this court to reverse the district court's denial of a writ of habeas corpus. Because Messam's claims fail the two-part

test for allegations of ineffective assistance of counsel, we affirm the district court's decision.

I. Factual and Procedural Background

Messam owned a Subway sandwich shop in Newark and a Big Bite sandwich shop in Orange. Rhonda Daye ("Rhonda" or "Ms. Daye") worked as a sandwich maker in these establishments and lived in an apartment above the Subway. On September 24, 1984, Detective Gary Miller of the Newark Police Department responded to a call and found the body of a female that he later learned was Ms. Daye lying on the inside wall of a vacant building below a window. She had been stabbed repeatedly. Detective Miller observed blood on the window sill above the body. Outside the building, Detective Miller observed a trail of blood from the street curb to the window sill and found, among other items, a bloodstained envelope and three bloodstained paper invoices, all bearing the words "Subway Sandwich Shop." He also found a bloodstained popcorn box. The next day, Mary Magdalene Daye reported that she had not seen her daughter, Rhonda, for several days. Mrs. Daye brought Detective Miller to her daughter's apartment, which the detective then searched. The search uncovered a torn-up note that Rhonda had addressed to Mr. Messam's wife. The note stated that Mr. Messam and Rhonda were having an affair and that Rhonda was pregnant with his child. Detective Miller also found another half finished note from Rhonda to Mrs. Messam in a notebook inside Rhonda's bedroom. After the search, Mrs. Daye confirmed that her daughter was the victim of the stabbing.

The police interviewed Mrs. Daye and the victim's cousin, Beverly Jones. Both Mrs. Daye and Ms. Jones corroborated the note's assertion that Rhonda was pregnant by Mr. Messam. Ms. Jones also told the police that Mr. Messam wanted Rhonda to

have an abortion and that Rhonda had refused. Ms. Jones stated that Rhonda had told her about a conversation between Rhonda and Mr. Messam during which Mr. Messam allegedly warned Rhonda that "he would get the baby out of her one way or another."

After interviewing Mrs. Daye and Ms. Jones, Detective Miller and Detective Whitner went to Mr. Messam's Subway store to interview him. The detectives did not inform Mr. Messam that they had found Ms. Daye's body, but instead told him that Ms. Daye was missing. When asked by the detectives, Mr. Messam agreed to go to the police station to provide a statement. Mr. Messam proposed to drive himself to the police station in the Honda which was parked outside, but agreed that Detective Miller could ride with him. After unlocking the passenger door from the outside, Mr. Messam moved some papers from the passenger seat to the rear seat to make room for Detective Miller. Detective Miller noticed that these papers were bloodstained.

At the police station Detective Miller questioned Mr. Messam without advising him of his *Miranda*[1] rights. In response to these questions, Mr. Messam stated that he knew Ms. Daye but that he had not seen her since the previous Friday. He also stated that he did not know about the bloodstained papers in the Honda, and that he was the only person who had used the car since the previous Thursday. Detective Miller then asked for permission to search the Honda. Mr. Messam, who is college-educated, read a consent-to-search form, listened to Detective Miller read the form again aloud, and signed it.

Detective Miller's search of the Honda produced 12

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

bloodstained papers and two bloodstained mugs, one of which had popcorn inside of it. Detective Miller also noticed small spots of blood on the front passenger side tire, the passenger side door, the front fender, and the hood. A notebook containing an unfinished letter from Rhonda to Mrs. Messam was found in the trunk.

After searching the Honda, Detective Miller noticed blood stains on the work boots Mr. Messam was wearing. The detectives then advised Mr. Messam of his *Miranda* rights, following which Mr. Messam declined to talk any further. Mr. Messam was then arrested.

In a pre-trial motion, Mr. Messam's counsel, Robert Brown, Esq., moved to suppress the physical evidence seized from the Honda and the statements Mr. Messam made at the stationhouse. Mr. Brown argued that the detectives' failure to disclose to Mr. Messam what they knew about Ms. Days and their failure to give Mr. Messam *Miranda* warnings before the initial questioning at the stationhouse rendered Mr. Messam's statements and his subsequent consent to search unconstitutional. Mr. Brown was successful in pasuadhg the state trial court to suppress most of the items seized from the Honda. However, the court did not exclude the bloodstained papers that Detective Miller saw when Mr. Messam unlocked the Honda because they were in plain view. The trial court also did not suppress the statements Mr. Messam made before the police informed him of his *Miranda* rights (the "stationhouse statements"). The trial judge asked Mr. Brown if he wanted the stationhouse statements to be suppressed, but noted that Mr. Messam would probably still be subject to cross-examination on the statements if he took the stand. Pet. App. at A-0185. Mr. Brown did not ask the court to suppress the stationhouse statements pre-trial.

Appendix A

The state requested and obtained a stay of the trial pending a motion for leave to appeal the trial court's suppression order. The Appellate Division granted leave to appeal and reversed the suppression order because it found that the decision to suppress the physical evidence seized from the Honda was erroneously based on the absence of a *Miranda* warning. The Appellate Division stated that "a *Miranda* warning is not a constitutional prerequisite to the validity of a consent to search" and it concluded that "the defendant offered nothing beyond the absence of *Miranda* warnings to support any claim that his consent was involuntary." Pet. App. at A-0116-0119. Because the opinion of the Appellate Division did not discuss the admissibility of the stationhouse statements, the state moved for reconsideration *nunc pro tunc*. The Appellate Division denied this motion, and the New Jersey Supreme Court refused to consider Mr. Messam's request for leave to appeal because the request was filed out of time. Pet. App. at A0128.

At his trial, Mr. Messam admitted having sex with Rhonda and testified that she told him she was pregnant with his child, although he denied that the child was his. Mr. Messam also testified that his wife had repeatedly inquired whether he was having an affair with Ms. Daye and that they had argued about her. Additionally, Ms. Jones was allowed to testify — over the defense's objection — that Mr. Messam had allegedly threatened to "get the baby out of [Ms. Daye] one way or another." The trial court ruled that the defense opened the door to this testimony by asking Ms. Jones about a fight between Mr. Messam and Ms. Daye that preceded the alleged statement.

Mr. Messam was convicted of murdering Ms. Daye and was sentenced to life imprisonment. Mr. Messam unsuccessfully appealed his conviction through the New Jersey state courts.

As a part of these direct appeals Mr. Messam claimed that he had received ineffective assistance of trial counsel. The Appellate Division rejected this claim, stating that even if Mr. Brown had been ineffective during the interlocutory appeal phase, a more effective lawyer would not have won the appeal because the Appellate Division would not have reached a different result had a different argument been made regarding the search of the Honda. After exhausting his direct appeals Mr. Messam applied to the federal district court for a writ of habeas corpus. Mr. Messam claimed that (1) he received ineffective assistance of trial counsel, (2) evidence seized from his vehicle was obtained as the result of an involuntary consent-to-search in violation of the Fourth Amendment, (3) the trial court improperly admitted statements obtained in violation of his *Miranda* rights, (4) the trial court erred by failing to charge the jury on a lesser included offense, and (5) the cumulative effect of these errors deprived him of his constitutional right to a fair trial.[2] On July 31, 1996, the district court issued an opinion denying Mr. Messam's petition.

II. The Requirement of a Certificate of Appealability Under the Antiterrorism and Effective Death Penalty Act of 1996

Pursuant to Mr. Messam's request, the district court issued a certificate of appealability/probable cause on August 27, 1996. Presumably, the district court titled this order as both a certificate of appealability and of probable cause because 28 U.S.C. § 2253, which governs the appealability of federal habeas decisions, was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132,110 Stat.

2. Mr. Messam raises only the ineffective assistance of counsel claim before this court.

1214(1996), while Mr. Messam's habeas application was pending.[3] Before AEDPA became effective on April 24, 1996, Section 2253 provided that a final order in a federal habeas proceeding instituted by a state prisoner could not be appealed unless the judge who rendered the order or a circuit justice or judge issued a certificate of probable cause. AEDPA amended Section 2253 to state that a final order in such a habeas proceeding may not be appealed unless a circuit justice or judge issues a certificate of appealability. Under the amended Section 2253, a judge may not issue a certificate of appealability unless the applicant makes "a substantial showing of the denial of a constitutional right." § 2253(c)(2) (1997). Additionally, the judge must specify in the certificate which issue or issues satisfy the "substantial showing" standard. *See* § 2253(c)(3).

Although at the time this case was briefed this court had not decided whether AEDPA's amendments to Section 2253 apply to habeas petitions that were pending when AEDPA was enacted, see *Santana v. United States*, 98 F.3d 752, 757 (3d Cir. 1996),[4] Respondents moved to vacate the certificate of

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3. Mr. Messam first applied for a writ of habeas corpus on or before April 10, 1995. *See* Petitioner's Appendix Volume I at A-0099.

4. When this case was briefed it was also unclear whether the AEDPA's amendments to 28 U.S.C. § 2254 apply to habeas petitions that were pending when the AEDPA was enacted, *see, e.g., Berryman v. Morton*, 100 F.3d 1089, 1102-04 (3d Cir. 1996) (noting that this court had not decided the issue), although this court applied the amended Section 2254 to a pending habeas application in a case where the result was unaffected by the amendments. *Dickerson v. Vaughn*, 90 F.3d 87, 90 (3d Cir. 1996). Since this case was briefed this court has recognized the Supreme Court's recent ruling that AEDPA's revisions to Section 2254 do not apply to habeas petitions (Cont'd)

appealability/probable cause because it did not state the specific issue or issues for which Mr. Messam had made a substantial showing of the denial of a constitutional right, as required by the amended § 2253(c)(2)-(3). This court granted Respondents' motion, vacated the certificate of appealability/probable cause, remanded to allow the district judge to specify which issues satisfy the amended § 2253 standard, and retained jurisdiction. The district court subsequently issued a certificate of appealability specifying that Mr. Messam had made the required showing for each of the five issues mentioned above.

After this court ruled on Respondents' motion to vacate, the Supreme Court held that AEDPA's amendments to Chapter 153 of Title 28 (which includes both Sections 2253 and 2254) generally apply only to cases filed after the AEDPA became effective. *Lindh v. Murphy*, __ U.S. __, 117 S. Ct. 2059, 2068 (1997).[5] Thus, the procedural requirements for Mr. Messam's

(Cont'd)
that were pending when the AEDPA was enacted. *Bey v. Morton*, No. 95-5608, 1997 WL 528654, at *4 (3d Cir. Aug. 28, 1997) (citing *Lindh v. Murphy*, __ U.S. __ 117 S. Ct. 2059, 2068 (1997)).

5. While the Supreme Court granted certiorari in *Lindh* to consider only whether the amended Section 2254 applies to habeas petitions that were pending when the AEDPA was enacted, the Court's reasoning and holding extend to AEDPA's amendments to all of Chapter 153, which includes both Sections 2253 and 2254. See *Lindh*, __ U.S. at __, 117 S. Ct. at 206264, 2068. *See also United States v. DeLario*, No. 97-50022, 1997 WL 464664, at *1 (5th Cir. Aug. 22, 1997) (recognizing that *Lindh* proscribes applying the amended Section 2253 to habeas petitions that were pending when the AEDPA became effective); *Arredondo v. United States*. Nos. 96-2126, 96-2583, 1997 WL 459716, at *1 (6th Cir. Aug. 13, 1997) (same); *Nelson v. Walker*, No. 1213, Docket 96-2354, 1997 WL 442686, at *4 (2d Cir. Aug. 7, 1997) (same); *Roybal v. Shanks*, No. 96-2096, 1997 WL 436238, at *1 n.1 (10th Cir. Aug. 4, 1997) (same).

appeal are governed by the former Section 2253, and Mr. Messam must obtain a certificate of probable cause to appeal the district court's ruling, rather than a certificate of appealability. The standard which Mr. Messam must meet to obtain the certificate of probable cause is also governed by pre-AEDPA law:[6] Mr. Messam must "make a substantial showing of the denial of [a] federal right." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (internal quotation omitted and alteration in original). To satisfy this standard Mr. Messam "need not show that he should prevail on the merits. . . . Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Id.* (internal quotation omitted and alteration in original).

A. Mr. Messam's Current Certificate of Appealability Satisfies the Requirement that He Obtain a Certificate of Probable Cause

Under the unamended Section 2253, this court does not have jurisdiction to consider Mr. Messam's appeal until he has obtained a certificate of probable cause. *See, e.g.*, 28 U.S.C. § 2253 (1995) ("An appeal may not be taken to the court of appeals . . . unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."); Fed. R App. P. 22(b); *Guyer v. Beard*, 907 F.2d 1424, 1427 (3d Cir. 1990); *Fitzsimmons v. Yeager*, 391 F.2d 849, 854 (3d Cir. 1968). Thus, this court must first consider whether

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6. *See Nelson v. Walker*, No. 1213, Docket 96-2354, 1997 WL 442686, at *4 (2d Cir. Aug. 7, 1997) (applying the pre-AEDPA standard for obtaining a certificate of probable cause to a habeas petition that was pending when the AEDPA became effective).

Mr. Messam's appeal may go forward given that his certificate of probable cause was vacated and replaced with a certificate of appealability.

We find that Mr. Messam's current certificate of appealability satisfies the requirement that he obtain a certificate of probable cause. To obtain a certificate of probable cause, Mr. Messam must "make a substantial showing of the denial of [a] federal right." *Barefoot*, 463 U.S. at 893. To obtain a certificate of appealability, Mr. Messam must make "a substantial showing of the denial of a constitutional right." 28 U. S.C. § 2253(c)(2). As the Second Circuit has noted, the difference between a substantial showing of a federal right and a substantial showing of a constitutional right is "a distinction without a difference since the writ [of habeas corpus] may issue upon the petition of a state prisoner only for the denial of a constitutional right." *Reves v. Keane*. 90 F.3d 676, 680 (2nd Cir. 1996) (citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). Following similar rationales the Second, Fifth, Seventh, and Tenth Circuits have concluded that the standards for issuing a certificate of appealability and certificate of probable cause are substantively identical, *see Reyes*, 90 F.3d at 680; *Drinkard v. Johnson*. 97 F.3d 751, 756 (5th Cir. 1996), *cert. denied* __ U.S. __, 117 S. Ct. 1114 (1997); *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996); *Lennox v. Evans*, 87 F.3d 431, 434 (10th Cir. 1996), *cert. denied* __ U.S. __, 117 S. Ct. 746 (1997), while the Ninth Circuit has concluded without discussion that the standard for obtaining a certificate of appealability is more demanding than the standard for obtaining a certificate of probable cause. *See Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996).

Because this case can be resolved without deciding whether

the standards for obtaining a certificate of appealability and a certificate of probable cause are identical, we need not decide whether we agree with the majority or minority of circuits on this issue. *See Taylor v. Peoples Natural Gas Company*, 49 F.3d 982, 991 (3d Cir. 1995) (Cowen, J., concurring) (stating that this court generally decides cases on the narrowest grounds possible). Since the standard for obtaining a certificate of appealability is at least as rigorous as the standard for obtaining a certificate of probable cause, it follows that the showing Mr. Messam made to obtain a certificate of appealability would satisfy the requirements for obtaining a certificate of probable cause. Accordingly, we find that Mr. Messam's current certificate is sufficient to allow his appeal to proceed.

B. Respondents' Motion to Vacate the Current Certificate of Appealability as Improvidently Granted

Respondents argue that none of Mr. Messam's claims are "the least bit debatable or meritorious," Resp. Br. at 46-47, and therefore he could not have met the standard for obtaining a certificate of appealability. Accordingly, Respondents move this court to vacate the second certificate of appealability as improvidently granted. *Id.* Mr. Messam replies by arguing that (1) Respondents are precluded from raising the motion to vacate because they failed to assert it before the district court, (2) this court implicitly rejected Respondents' argument when it remanded to allow the district court to issue a second certificate of appealability, and (3) the district court's issuance of the certificate was appropriate and should not be disturbed. Pet. Reply Br. at 22-25.

We need not address Respondents' motion or Mr. Messam's arguments in response. Under the pre-AEDPA law that governs

this case, once a district judge issues a certificate of probable cause the court of appeals is obligated to address the merits of the appeal. *Barefoot*, 463 U.S. at 888-89; *Garrison v. Patterson*, 391 U.S. 464, 466 (1968) (per curiam); *Carafas v. LaVallee*, 391 U.S. 234, 242 (1968) *Nowakowski v. Maroney*, 386 U.S. 542, 543 (1967); *Dobbert v. Strickland*, 670 F.2d 938, 939 (11th Cir. 1982). Since we accept Mr. Messam's current certificate of appealability as the equivalent of a certificate of probable cause, we are required to address the merits of Mr. Messam's appeal.

III. Mr. Messam's Claim that He was Rendered Ineffective Assistance of Trial Counsel

Although the district court certified five issues for appeal, Mr. Messam's brief to this court raises only three variations of his claim that he was rendered ineffective assistance of trial counsel. First, Mr. Messam argues that the district court erred in finding that defense counsel was not ineffective in arguing that Mr. Messam's Fourth Amendment rights were violated. Second, Mr. Messam claims that the district court erred in finding that defense counsel was not ineffective by failing to move for suppression of the stationhouse statements. Third, Mr. Messam alleges that the district court erred in finding that defense counsel was not ineffective by opening the door to Ms. Jones' testimony about Mr. Messam's alleged threat that he would "get the baby out of" Ms. Daye. Mr. Messam further claims that the district court erred in finding that, even had ineffectiveness been shown, it did not prejudice his defense and did not render his trial unfair.

A. Standard of Review

Mr. Messam brings this petition under 28 U.S.C. § 2254, which governs federal habeas proceedings instituted by state

prisoners. As noted above, this case must be decided under the law as it existed before the AEDPA's revision of Section 2254. *See Lindh*, __ U.S. at __, 117 S. Ct. at 2062-64, 2068. Under that law, ineffective assistance of counsel claims present mixed questions of law and fact. *See Berryman*, 100 F.3d at 1095; *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993). State court findings of fact are presumed correct so long as they are fairly supported by the record. 28 U.S.C. § 2254(d); *Berryman*, 100 F.3d at 1094. However, "[a]n effectiveness claim require[s] the application of a legal standard to the historical-fact determinations" and thus the ultimate question of whether counsel was effective is a uniquely legal conclusion subject to de novo review. *Id.* at 1095.

In order for a defendant to establish that his counsel was ineffective, he must satisfy the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must show that (1) counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms," and (2) the defendant suffered prejudice as a result — that is, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Both prongs of the *Strickland* test must be met before the defendant may obtain habeas relief. *United States v. Nino*, 878 F.2d 101, 103 (3d Cir.1989).

In applying the *Strickland* test, a court must be "highly deferential" to counsel's decisions. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. The Supreme Court has established a "strong presumption" that counsel's performance was reasonable.

Accordingly, the defendant must overcome a presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Id.* Because counsel is afforded such a wide range within which to make decisions without fear of subsequent judicial second-guessing, this court has cautioned that it is "only the rare claim of ineffective assistance of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." *United States v. Gray*, 878 F.2d 702, 711 (3d Cir.1989).

B. Mr. Messam's Assertion that the District Court Erred in Finding that Defense Counsel was not Ineffective in Pressing His Fourth Amendment Claim

Mr. Messam argues that Mr. Brown was unconstitutionally ineffective in arguing for the suppression of the physical evidence seized from the Honda. Pet. Br. at 22-31. We affirm the district court's ruling because Mr. Messam's arguments fail both the performance and prejudice prongs of the *Strickland* test.

1. *Strickland*'s Performance Prong

Mr. Messam correctly notes that the question of whether the physical evidence seized from the Honda should be suppressed turns on whether he voluntarily gave the police consent to search. *See Bolden v. Southeastern Penn. Transp. Auth.*, 953 F.2d 807, 824 (3d Cir. 1991). The voluntariness of Mr. Messam's consent is a question of fact to be determined from the totality of the circumstances. *Id.* at 825. A variety of factors have been found to bear upon the voluntariness of a defendant's consent. *See* W. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment*, § 8.2, 634 (2d ed. 1987). Accordingly, Mr. Messam argues that Mr. Brown improperly

limited his suppression argument to the fact that the police had not given *Miranda* warnings to Mr. Messam at the time he gave consent to search and that he ignored other factors indicating involuntariness.

Since Mr. Brown was successful in convincing the trial court to suppress the items seized from the Honda, Mr. Messam's ineffectiveness claim is limited to Mr. Brown's performance on appeal. Mr. Messam argued to the district court that, in addition to the *Miranda* factor, Mr. Brown should have argued that Mr Messam was (1) in custody, (2) never told that he should consult with an attorney, (3) deceived by the detectives as to the true nature of their investigation, and (4) that Mr. Messam had denied any knowledge as to the origin of the blood in the Honda. *See Messam v. Morton*, Civ. No. 95-1800 at 12 (D. N.J. July 31, 1996). However, the district court correctly noted that Mr. Brown specifically argued to the Appellate Division that Mr. Messam was in custody, that he should have been given *Miranda* warnings, and that the police misled him as to the reason he was at the police station. *See Messam,* Civ. No. 95-1800 at 13; Pet. App. at A-0046-0054. He asserted that the alleged police subterfuge rendered Mr. Messam's consent involuntary because it deprived Mr. Messam of the ability to make an informed choice after evaluating the available options. Additionally, Mr. Brown referred the Appellate Division to the proper standard for judging whether Mr. Messam's consent was voluntary. *See* Pet. App. at A-0053-0054. Mr. Brown also explained how the federal law of consent searches is impacted by New Jersey caselaw, and he developed a colorable argument that the New Jersey Supreme Court's precedents should be read to require police to give a *Miranda* warning before obtaining consent to search in a custodial setting. *Id.* Mr. Messam asserts to this court that Mr. Brown should have argued that Mr. Messam's consent

was invalid because he was (1) subjected to a show of force by the police when they met him at his Subway store, (2) questioned at the police station, (3) not informed that he had the right to refuse consent, and (4) deceived as to the police's purpose in questioning him. Pet. Br. at 27-28. However, as noted above, Mr. Brown did raise many of these arguments before the Appellate Division. While Mr. Brown did not assert every factor Mr. Messam now claims should have been asserted, we find that his performance was within the wide range of professionally competent assistance. Accordingly, we affirm the district court's ruling.

2. *Strickland*'s Prejudice Prong

The district court held that, even if Mr. Messam had demonstrated that Mr. Brown was ineffective in suppressing the items seized from the Honda, habeas could not be granted under *Strickland* because Mr. Messam failed to show that the ineffectiveness prejudiced his defense. To demonstrate the necessary prejudice Mr. Messam must show that his "Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 2583 (1986). He must also show that "counsel's errors were so serious as to deprive [him] . . . of a fair trial, a trial whose result is reliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (quoting *Strickland*, 466 U.S. at 687). The district court held that Mr. Messam could not demonstrate that the jury would have reached a different result had it not viewed the challenged evidence because the state had "substantial" evidence of Mr. Messam's guilt aside from the challenged evidence. *Messam*, Civ. No. 95-1800 at 14.

We affirm the district court's holding that Mr. Messam could not satisfy *Strickland*'s prejudice prong. Mr. Messam's claim that his consent to search the Honda was coerced is not supported by the record. When the police met Mr. Messam at his Subway store, they accepted Mr. Messam's offer to drive his own car to the police station to make a statement about Ms. Daye. Pet. Br. at 6. The record reflects that Detective Miller did not question Mr. Messam on the way to the police station. Pet. App. at A-0227. At the police station, the detectives asked Mr. Messam only a few questions before asking for his consent to search the Honda. Pet. App. at A-0228-0234; Resp. App. at 256-58. In fact, Mr. Messam had been at the police station less than 45 minutes when he signed the consent-to-search form. *Compare* Resp. App. at 256 (stating that Mr. Messam arrived at the police station about 8:35 p.m.) *with* Pet. App. at A-0111 (stating that Mr. Messam signed the form at 9:17 p.m.). Following these few questions, Mr. Messam agreed to allow the police to search the Honda. Pet. Br. at 7; Pet. App. at A-0111, A-0294. He read the consent-to-search form given to him by the police, listened to Detective Miller read it again aloud, and signed it. Resp. App. at 13-14, 258; Pet. App. at A-0111. The form states that Mr. Messam was advised of his right to refuse consent, and that he gave his consent voluntarily. Pet. App. at A-0111. Thus, by reading the form and listening to Detective Miller's reading, Mr. Messam was notified at least twice that he could refuse consent. As Mr. Messam emphasizes in his brief, he is a college-educated businessman who is capable of understanding his options and making decisions. Pet. Br. at 2-4. His knowledge of the right to refuse consent is substantial evidence of his voluntariness. *See United States v. Mendenhall* 446 U.S. 544, 558 (1980); *United States v. Thams,* 846 F.2d 200, 204 (3d Cir. 1988). In light of all of these factors, we fmd that Mr. Message could not establish that his consent to search was involuntarily granted.

Moreover, Mr. Messam admitted at his trial that he voluntarily chose to consent to Detective Miller's search of the Honda. While Mr. Messam was testifying on direct, he and Mr. Brown had the following exchange:

Mr. Brown: "And when you went down there [to the policestation], did he [Detective Miller] ask to search your car?"

Mr. Messam: "Yes. I told him I had nothing to hide. He asked, can I go and search the car."

Mr. Brown: "I heard you say you had nothing to hide and it was okay to search the car."

Mr. Messam: "Yes, I gave him my permission."

Mr. Brown: "As a matter of fact, you signed a form giving him permission to search the car, did you not?"

Mr. Messam: "Yes, I did."

Mr. Brown: "Mr. Messam, the police officer gave you a form and asked you to sign it indicating that you would allow him to search the car, is that correct?"

Mr. Messam: "He did. I signed it and gave it back to him."

Resp. App. at 475-76.

While the record supports Mr. Messam's assertion that the police did not tell him everything they knew about Ms. Daye

and her relationship with Mr. Messam, *see* Pet. App. at A-0212-0215, the record also reflects that the police did identify themselves as detectives from the homicide squad and asked if they could question Mr. Messam about Ms. Daye. Resp. App. at 293. While police deception can be a factor indicating coercion, the police are not required to inform a suspect of the full extent of their knowledge or investigation. *See, e.g., United States v. Bryson*, 110 F.3d 575, 582 (8th Cir. 1997) (police did not inform suspect that she had been indicted); *United States v. Davis*, 749 F.2d 292, 295 (5th Cir. 1985) (police obtained statement that defendant possessed guns without disclosing that they knew of defendant's felon status); *United States v. Turpin*, 707 F.2d 332, 335 (8th Cir. 1983) (police told murder suspect that the victim had been in an accident, but not that he had been killed); *Brown v. Brierley*, 438 F.2d 954 (3d Cir. 1971) (police offered to assist in sale of suspect's gun but did not inform him that they would run ballistics tests before sale). The record also reflects Mr. Messam's assertion that the police used threatening language to convince Mr. Messam to come to the police station. Pet. App. at A-0313. However, given the substantial evidence of voluntariness in this case, the totality of the circumstances does not indicate that Mr. Messam's "will [was] . . . overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). Since Mr. Messam cannot prove a meritorious Fourth Amendment violation, his claim that his counsel was ineffective in arguing that violation must fail. *Kimmelman*, 477 U.S. at 382 ("a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim"). We note that the Appellate Division reached this same result in considering Mr. Messam's ineffective-assistance claim. That court noted that, even if Mr. Brown was ineffective in arguing Mr. Messam's interlocutory appeal, Mr. Messam's claim would still fail because

a more effective lawyer could not have won the appeal before the Appellate Division with a different argument. *See State v. Messam*, No. A-166-89T4, slip op. at 12 (N.J. Super. Ct. App. Div. Feb. 26, 1992). In light of the significant evidence indicating that Mr. Messam voluntarily gave consent to search the Honda, we agree with the Appellate Division's conclusion.

But the failure of Mr. Messam's Fourth Amendment issue is not the only weakness in his prejudice argument. He also must show that his trial was unfair and that the result would have been different if the challenged evidence had been excluded. *Lockhart*, 506 U.S. at 369; *Kimmelman*, 477 U.S. at 375, 106 S. Ct. at 2583. As the district court concluded, even if the Appellate Division had affirmed the district court's suppression of the items seized from the Honda, the state would have nevertheless presented the jury with substantial evidence of Mr. Messam's guilt. The jury still would have received (1) Mr. Messam's confession that he had an affair with Ms. Daye and that she claimed the child was his, (2) Mr. Messam's acknowledgment that his wife suspected the affair and that he fought with her about it on several occasions, (3) the notes from Ms. Daye's apartment telling Mrs. Messam about the affair, the pregnancy, and Mr. Messam's refusal to help Ms. Daye, (4) Mr. Messam's bloody boots and the expert testimony that the blood was human, (5) the bloodstained papers from the Honda that were in plain view and the expert testimony that the blood's enzymes were consistent with Ms. Daye's blood but not Mr. Messam's,[7] (6) the bloodstained papers bearing the logo of Mr.

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7. This testimony linking the blood evidence taken from the Honda to Ms. Daye was weighty. The state's forensic expert testified at trial that only 3.8% of the African-American population has the combination of enzymes common to Ms. Daye and the blood found on the mugs and papers in the Honda. *See* Pet. App. at A-0308.

Messam's shop that were found near Ms. Daye's body, (7) expert testimony that Ms. Daye was not killed at the vacant building but rather killed elsewhere in a brutal confrontation, dragged to the vacant building, and dumped through the window (suggesting that Mrs. Messam could not have been the killer). Based on this evidence, we agree with the district court's finding that Mr. Messam has not shown "a reasonable probability that the verdict would have been different absent the excludable evidence," *Kimmelman*, 477 U.S. at 375, 106 S. Ct. at 2583, and has also not shown that the trial was unfair.

C. Respondent's Assertion that Stone v. Powell *Bars Mr. Messam's Fourth Amendment-Based Ineffective Assistance Claim*

Respondents assert that the rule announced in *Stone v. Powell*, 428 U.S. 465 (1976) bars Mr. Messam from raising his Fourth Amendment-based ineffective assistance claim. Resp. Br. at 30-31. *Stone* held that a state prisoner cannot obtain habeas relief based on a Fourth Amendment claim if he had a full and fair opportunity to litigate that claim in state court. 428 U.S. at 481-82. However, in *Kimmelman*, 477 U.S. at 375, the Supreme Court held that *Stone* does not apply to ineffective assistance of counsel claims based on counsel's alleged failure to competently litigate Fourth Amendment claims. Accordingly, Respondents' argument that Stone bars Mr. Messam's Fourth Amendment-based claim is without merit. *See also Withrow v. Williams*, 507 U.S. 680, 688, 113 S. Ct. 1745, 1750 (1993); *United States v. Owens*, 882 F.2d 1493, 1498 n.5 (10th Cir. 1989); *Nell v. James*, 811 F.2D 100, 105 (2d Cir. 1987).

D. Mr. Messam's Assertions that His Counsel was Ineffective in Failing to Move for Suppression of the Stationhouse Statements and in Allowing Ms. Jones' Hearsay Testimony

Mr. Messam asserts that Mr. Brown should have moved the trial court to suppress the stationhouse statements because they were obtained before the police advised Mr. Messam of his *Miranda* rights. Pet. Br. at 32-37. Mr. Messam claims that the admission of the stationhouse statements prejudiced his case because his alleged statement that he was the only person who had used the Honda since before Ms. Daye's murder allowed the jury to link him to the bloodstained items retrieved from the car. *Id.* Mr. Messam further asserts that Mr. Brown departed from professional norms when he chose to question Ms. Jones about an occasion where Ms. Daye fought with Mr. Messam and hit him in the face with a brick because that testimony opened the door to Ms. Jones' statement that Mr. Messam had threatened to "get the baby out of" Ms. Daye, Pet. Br. at 38-40.

In resolving these claims, we do not express an opinion as to the whether Mr. Brown's challenged performance fell within the broad range of professionally competent assistance because we conclude that both claims fail *Strickland*'s prejudice prong. Even if the stationhouse statements and Ms. Jones' testimony had been excluded from Mr. Messam's trial, the jury would still have been presented with the substantial evidence of Mr. Messam's guilt discussed above. Moreover, given our ruling that Mr. Messam's Fourth Amendment claim is not meritorious, the jury would also have been presented with the overwhelming blood evidence seized from the Honda. Because the evidence of Mr. Messam's guilt is substantial we cannot say that the introduction of the stationhouse statements and Ms. Jones' testimony rendered the trial unreliable or unfair.

Appendix A

IV. Conclusion

For the foregoing reasons, we affirm the district court's denial of a writ of habeas corpus.

TO THE CLERK OF THE COURT:

Kindly file the foregoing unpublished opinion.

s/ illegible
Circuit Judge

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 19, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5558

GLADSTONE MESSAM,

Appellant

v.

WILLIS MORTON, Superintendent, N.J. State Prison; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 95-1800)

Present: Stapleton, Alito, and Seitz, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on October 16, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 2, 1996, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

Appendix B

ATTEST:
s/ P. Douglas Sisk
P. Douglas Sisk
Clerk

Dated: November 19, 1997

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MARCH 20, 1997

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Honorable Alfred M. Wolin, U.S.D.J.

Civ. No. 95-1800(AMW)
Third Circuit Docket No. 96-555B

GLADSTONE MESSAM,

Appellant,

vs.

WILLIS MORTON, SUPERINTENDENT OF THE NEW JERSEY STATE PRISON, AND THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Appellees.

Appendix C

ORDER

This matter having been remanded to the District Court by Order of the Third Circuit Court of Appeals, dated February 18, 1997, for compliance with the requirement of 28 U.S.C. § 2253(c)(3) that the Certificate of Appealability indicate which specific issue or issues satisfies the § 2253(c)(2) standard: and the Court having considered all papers submitted in connection with the application for a Certificate of Appealability:

IT IS on this 20th day of March, 1997

ORDERED as follows:

Appellant's application for issuance of a Certificate of Appealability is hereby granted on the following specific issues:

(1) Whether the evidence seized from Messam's vehicle was obtained as the result of an involuntary consent to search in violation of the Fourth Amendment;

(2) Whether the trial court improperly admitted statements in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966);

(3) Whether Messam received ineffective assistance of counsel;

(4) Whether the trial judge erred by failing to charge the jury on the lesser included offense of passion/ provocation manslaughter; and

Appendix C

(5) Whether the cumulative effect of the errors deprived Messam of his constitutional right to a fair trial; and

A Certificate of Appealability shall issue

s/ Alfred M. Wolin
Alfred M. Wolin, U.S.D.J.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 18, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. NO. 96-5558

(D.N.J. CIV. NO. 95-CV-01800)

GLADSTONE MESSAM

vs.

WILLIS MORTON, ET AL.

Present: MANSMANN, SCIRICA AND LEWIS, *CIRCUIT JUDGES*

Submitted are:

(1) Appellees' motion to vacate the district court's order granting a certificate of appealability and supporting appendix; and

(2) Appellant's response in opposition, which includes a request for leave to file a memorandum in support of a request for a certificate of appealability, and supporting appendix in the above captioned case.

Respectfully,

s/ P. Douglas Sisk
Clerk

PDS/CJG

Appendix D

ORDER

Appellees' motion to vacate the district court's order issuing appellant a certificate of appealability is granted and the matter is remanded to the district court for compliance with the requirement of 28 U.S.C. § 2253(c)(3) that the certificate of appealability indicate which specific issue or issues satisfies the § 2253(c)(2) standard. The Court will retain jurisdiction.

By the Court,

s/ Carol L. Mansman
Circuit Judge

Dated: February 18, 1997

cmh/cc: M.P.B.
B.A.R.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED AUGUST 27, 1996

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Honorable Alfred M. Wolin, U.S.D.J.

Civ. No. 95-1800(AMW)

GLADSTONE MESSAM,

Petitioner,

vs.

WILLIS MORTON, SUPERINTENDENT OF THE NEW JERSEY STATE PRISON, AND THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

Appendix E

ORDER

This matter having been opened to the Court upon application of Lowenstein, Sandler, Kohl, Fisher & Boylan (by Mathew P. Boylan, Esq.), counsel for Petitioner, for issuance of a Certificate of Appealability/Probable Cause; and the Court having considered all papers submitted in support of this application;

IT IS on this 27th day of August, 1996

ORDERED as follows:

Petitioner's application for issuance of a Certificate of Appealability/Probable Cause is hereby granted; and

A Certificate of Appealability/probable Cause shall issue.

s/ Alfred M. Wolin
Alfred M. Wolin, U.S.D.J.

APPENDIX F — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, DATED JULY 31, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No.
95-1800

GLADSTONE MESSAM,

Petitioner,

v.

WILLIS MORTON, et al.,

Respondents.

MEMORANDUM OPINION

Petitioner Gladstone Messam, currently incarcerated at the New Jersey State Prison, brings this *pro se* petition for habeas corpus relief pursuant to 28 U.S.C. § 2254.[1] In support of his claim that he is in custody in violation of his constitutional rights petitioner alleges that: (1) the evidence seized from his

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1. Section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

vehicle was obtained as the result of an involuntary consent to search in violation of the Fourth Amendment; (2) the trial court improperly admitted statements derived in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966); (3) he received ineffective assistance of counsel; (4) the trial judge erred by failing to charge the jury on the lesser included offense of passion/provocation manslaughter; and (5) the cumulative effect of the errors deprived him of his constitutional right to a fair trial.

Respondents Willis Morton, Supervisor of the New Jersey State Prison, and the Attorney General of New Jersey contend that: (1) consideration of petitioner's Fourth Amendment claim is barred by *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976); (2) *Miranda* warnings were not required under the circumstances; (3) petitioner received effective assistance of counsel; (4) the trial judge was not required to charge the jury, *sua sponte*, on passion/provocation manslaughter where the facts did not clearly indicate the necessity for such a charge and; (5) there can be no cumulative egregious error warranting habeas corpus relief where the alleged shortcomings are without merit when considered individually.

For the reasons set forth below, the court will deny petitioner's application for a writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

On January 13, 1989, a Jury found petitioner guilty of first degree murder,[2] fourth degree possession of a sharp instrument,[3] and third degree possession of a sharp instrument

2. *See* N.J.S.A. § 2C:11-3(a)(1) and (2).

3. *See* N.J.S.A. § 2C:39-5(d).

with the purpose to use it unlawfully.[4] Petitioner was sentenced to life imprisonment with a thirty-year parole disqualifier.

Petitioner appealed his conviction and on February 26, 1992, the New Jersey Superior Court Appellate Division affirmed. After the New Jersey Supreme Court denied his petition for certification, petitioner filed a petition for post-conviction relief with the trial court. On March 26, 1993, the New Jersey Superior Court denied the petition for post-conviction relief. Petitioner then filed a Notice of Appeal with the New Jersey Superior Court Appellate Division. On June 13, 1994, the Appellate Division affirmed petitioner's conviction, and his petition for certification was denied by the New Jersey Supreme Court on October 12, 1994.

The facts underlying petitioner's conviction and current application for habeas corpus relief arose out of the death of Rhonda Daye in September 1984. Petitioner owned the Subway Sandwich Shop located in Newark where the victim worked. Daye's body was found on September 24, 1984 in an abandoned building at 85 South Orange Avenue with thirty-one stab wounds to the neck and chest areas. Detective Gary Miller of the Newark Police Department, Homicide Squad, was assigned the case. Detective Miller observed blood drippings on various items within a short distance of the warehouse in which the body was found.[5]

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4. *See* N.J.S.A. § 2C:39-4(d).

5. Approximately eighty feet west of the area in which the body was found, a bloodstained envelope with the words "Subway Sandwich Shop" was found along with three invoices bearing the same name. A bloodstained popcorn box and comb were also found (Cont'd)

Appendix F

On September 25, 1984, Detectives Miller and Whitner went to the Subway Sandwich Shop to speak to petitioner. After informing petitioner that Daye was missing,[6] the detectives requested that petitioner accompany them to the police station to give a formal statement. Petitioner drove his own vehicle accompanied by Detective Miller. Upon entering petitioner's vehicle, Detective Miller noticed several papers on the front seat spotted with blood. At the Newark police station, petitioner denied any knowledge of the bloodstained papers in his vehicle. Petitioner subsequently signed a consent to search form.[7]

The detectives then searched petitioner's vehicle and recovered various bloodstained papers and articles.[8] Petitioner was then arrested and advised of his constitutional rights as required by *Miranda*. After a suppression hearing, the trial judge excluded all the items seized from petitioner's vehicle except

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(Cont'd)
nearby. A bloodstained tire and juice box were found just east of the popcorn box. Detective Miller observed that the trail of bloodied items led from the Subway Sandwich Shop invoices to the window sill under which the body was found. (January 10, 1989 trial transcript at 30-39).

6. Daye's body had already been discovered when Detectives Miller and Whitner went to speak to the petitioner.

7. Petitioner had not been "*Mirandized*" before he signed the consent to search form. The consent form was signed approximately forty-five minutes after petitioner arrived at the police station.

8. Twelve pieces of bloodstained paper were found in petitioner's vehicle along with two bloodstained coffee mugs. Blood was also discovered on the exterior of petitioner's vehicle and on the boots he was wearing when he was arrested.

the papers which were found to be in Detective Miller's plain view when he entered the vehicle. The Appellate Division, however, reversed the trial court's ruling suppressing the items seized from the vehicle and remanded, holding that "the giving of a *Miranda* warning is not a constitutional prerequisite to the validity of a consent to search." Petitioner was subsequently tried, convicted, and sentenced to a life term of imprisonment. On April 20, 1995, petitioner filed the instant petition for habeas corpus relief.

DISCUSSION

The Court begins its analysis by noting that *pro se* petitions are to be read more leniently than petitions drafted by attorneys. *See Haines v. Kerner,* 404 U.S. 519, 92 S. Ct. 594 (1972).

A. Consent to Search

Petitioner claims a violation of his Fourth Amendment right against unreasonable search and seizure. He argues that the evidence obtained from his vehicle was inadmissible because it was obtained through an involuntary consent to search. Respondent counters that *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976), bars this Court's examination of petitioner's Fourth Amendment claim because petitioner was afforded "full and fair litigation" at the state level.

The exclusionary rule of the Fourth Amendment "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 620 (1974). There the State has "provided an opportunity for

full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial." *Stone*, 428 U.S. at 494, 96 S. Ct. at 3052. The underlying rationale of *Stone* is that the incremental benefit in deterring illegal police conduct by applying the exclusionary rule in a habeas corpus proceeding does not outweigh the costs to society of excluding relevant, reliable evidence in a criminal prosecution. *See Gilmore v. Marks*, 799 F.2d 51 (3d Cir. 1986), *cert. denied*, 479 U.S. 1041, 107 S. Ct. 903 (1987) (citing *Stone*).

The "Antiterrorism and Effective Death Penalty Act of 1996", Pub. L. No. 104-132, sec. 101, § 2254, 110 Stat. 1214, (hereinafter "Antiterrorism Act"), signed into law on April 24, 1996, amended 28 U.S.C. § 2254 to provide that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Appendix F

In the instant case, petitioner's claim was fully examined at the state level through a two-day pre-trial suppression hearing, on direct appeal, and in post-conviction relief proceedings. The New Jersey state court determined that no constitutional violations existed. Petitioner has therefore been afforded "full and fair litigation" of his Fourth Amendment claim at the state level. Accordingly, under *Stone* and the Antiterrorism Act, this Court is precluded from addressing petitioner's Fourth Amendment claim or granting habeas corpus relief based thereon.[9]

B. Admission of Petitioner's Statements

Petitioner contends that the trial court committed reversible error by admitting into evidence the statement he made to police on the date of his arrest. Petitioner alleges that he was subjected to a "custodial interrogation" without first being advised of his rights under *Miranda*

Statements made during a custodial interrogation are inadmissible if the person being questioned has not been informed of his "right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. "Custodial interrogation" has been interpreted to mean

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9. Petitioner additionally claims that the items seized from his vehicle should have been suppressed because he was not "*Mirandized*" prior to his consent to the search. *Miranda* warnings, however, are not a prerequisite to a valid consent to search. *See Hubbard v. Jeffries*, 653 F.2d 99, 103 (3d Cir.) ("The absence of *Miranda* protections are addressed to constitutional rights that are distinct from Fourth Amendment rights.").

"questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* The question of whether a suspect is "in custody" and, therefore, "entitled to *Miranda* warnings presents a mixed question of fact and law qualifying for independent review." *Thompson v. Keohane*, __U.S. __, 116 S. Ct. 457, 460 (1995).

In the instant case petitioner offers no evidence, beyond his own unsupported allegations that he was a suspect and "forced" to go to the police station, to support his claim that he was "in custody". However, *Stansbury v. California*, 511 U.S. 318, 114 S. Ct. 1526, 1529 (1994), makes clear that the subjective view of the defendant is irrelevant to the determination of whether he is "in custody" for *Miranda* purposes. Moreover, even assuming that the challenged statements should have been suppressed, the record clearly reveals that any error in their admission was harmless.

Habeas petitioners are entitled to relief only where the error had a "substantial and injurious effect or influence in determining the jury's verdict," and they can "establish that it resulted in actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722 (1993). In *O'Neal v. McAninch*, __ U.S. __, 115 S. Ct. 992, 995 (1995), the Supreme Court clarified the *Brecht* standard and held that the appropriate inquiry for a judge was to ask himself, "Do I, the judge, think that the error substantially influenced the jury's decision? "

In the instant case the only statement petitioner made before being advised of his rights under *Miranda* that could conceivably be claimed to have had a substantial influence upon the jury's verdict was his statement that he had been the only

person to use the vehicle in which the bloodied items were found. *See O'Neal,* 115 S. Ct. at 995. However, there was substantial other evidence of petitioner's guilt. Evidence of motive was revealed through letters the victim wrote to petitioner's wife detailing the relationship between petitioner and victim and the victim's subsequent pregnancy; blood evidence surrounding the crime scene including letterhead bearing the name of petitioner's place of business, blood on petitioner's boots, and blood on various items in petitioner's vehicle.[10]

When examined in light of the totality of the evidence against petitioner, this Court finds that even assuming such statements were improperly admitted, the jury's decision was not substantially influenced by their admission. Accordingly, under *Brecht* and *O'Neal*, any error in the admission of such statements is considered harmless and cannot serve as the basis for this Court's grant of a petition for habeas corpus relief.

C. Ineffective Assistance of Counsel

Petitioner next asserts that he received ineffective assistance of counsel both prior to and during trial which impermissibly deprived him of his Sixth and Fourteenth Amendment rights to a fair trial.

The Supreme Court has long recognized that the Sixth Amendment right to counsel necessarily includes "the right to

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10. Forensic testing showed that the blood found on the items recovered from petitioner's possession was inconsistent with petitioner's blood type but consistent with that of the victim. The specific blood enzyme found, which was inconsistent with petitioner, occurs in only 3.8% of the black population.

the effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). The "benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686, 104 S. Ct. at 2064.

To prevail on a claim of ineffective assistance of counsel, petitioner must satisfy two requirements: (1) that counsel's performance was deficient and (2) that the deficiency prejudiced the defense. 466 U.S. at 687, 104 S. Ct. at 2064 ("[u]nless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.").

The first prong requires petitioner to show that counsel performed below "an objective standard of reasonableness." 466 U.S. at 688, 104 S. Ct. at 2064. The Supreme Court in *Strickland* cautioned that "judicial scrutiny of Counsel's performance must be highly deferential," 466 U.S. at 689, 104 S. Ct. at 2065, and explained that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* The Court noted that, because making such a determination is difficult, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance; that is, the defendant must overcome the presumption that, under the circumatances, the challenged action 'might be considered sound trial strategy.' " *Id.*

Thus, in examining petitioner's claim, this Court must judge the reasonableness of counsel's actions according to the facts of the case as viewed by counsel at the time of trial. The burden is on petitioner to identify specific acts or omissions of counsel that were the result of unreasonable professional judgment. The Court will then determine whether such identified acts or omissions are outside the wide range of professionally competent assistance. 466 U.S. at 690, 104 S. Ct. at 2066.

In order to satisfy the second prong of the *Strickland* test, petitioner must show that counsel's ineffectiveness was prejudicial to his defense. 466 U.S. at 693, 104 S. Ct. at 2067. Petitioner bears the burden of proving "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 2583 (1986); *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. "[I]n determining the existence *vel non* of prejudice, the court 'must consider the totality of the evidence before the judge or jury.' " *Kimmelman*, 477 U.S. at 381, 106 S. Ct. at 2586 (quoting *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069).

(1) Ineffective Assistance of Counsel at Suppression hearing and Interlocutory Appeal

Petitioner asserts that defense counsel failed to "properly litigate a meritorious Fourth Amendment claim and [failed] to mount [a] timely motion to suppress statements allegedly obtained in violation of *Miranda*. (Petitioner's brief at 14). These claims are not supported by the record.

Appendix F

(a) Fourth Amendment Claim

As petitioner concedes, defense counsel successfully persuaded the trial court to suppress many of the items seized from petitioner's vehicle. However, petitioner charges defense counsel with ineffectiveness on appeal on the ground that counsel argued only the absence of *Miranda* warnings before the Appellate Division when counsel should have raised other factors. Specifically, petitioner asserts that defense counsel should have argued that he was: (1) in custody, (2) never told he should consult with an attorney, (3) deceived by the detectives as to the true nature of their investigation and, (4) that petitioner had denied any knowledge as to the origin of the blood in his vehicle. (Petitioner's brief at 16).

The record, however, including the brief defense counsel submitted to the Appellate Court, does not support petitioner's claim. Defense counsel specifically argued in his appellate brief that petitioner was in custody, that he should have been *Mirandized*, and that the police misled petitioner as to the reason he was at the police station.[11] Clearly, petitioner has failed to overcome the strong presumption that trial counsel did not act outside the "wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066.

Nevertheless, even had petitioner demonstrated that counsel

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11. This Court acknowledges that the New Jersey Superior Court Appellate Division, in its opinion reversing the trial court's order, concluded that petitioner had "offered nothing beyond the absence of *Miranda* warnings to support any claim that his consent was involuntary." The relevant question on petitioner's ineffective assistance of counsel claim, however, is whether defense counsel raised the issue, which he clearly did.

was ineffective, he has not satisfied the second prong of *Strickland* which requires a showing that counsel's ineffectiveness prejudiced his defense. To demonstrate actual prejudice the petitioner must prove "that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman*, 477 U.S. at 375, 106 S. Ct. at 2583.

Assuming, *arguendo*, that petitioner's Fourth Amendment claim is meritorious,[12] petitioner still cannot demonstrate that had the jury not viewed the challenged evidence the verdict would have been different. The evidence pointing to petitioner's guilt aside from the challenged evidence was substantial. Petitioner has not proven that there is a "reasonable probability that the verdict would have been different absent the excludable evidence." *Id.*

(b) Failure to File Timely Motion to Suppress Statements

Petitioner argues that defense counsel's failure to move for suppression of the statements petitioner made to police constitutes ineffective assistance of counsel. Defense counsel specifically addressed the issue at the suppression hearing, and determined that petitioner's statements more than likely did not contain information damaging to his defense of petitioner.[13]

12. Under *Kimmelman*, a "good Fourth Amendment claim alone will not earn a prisoner federal habeas relief." 477 U.S. at 382, 106 S. Ct. at 2586.

13. Petitioner's counsel stated at the suppression hearing: "Well Judge, I don't think there's anything that damaging at the police station frankly either." (September 9, 1986 suppression hearing transcript at 39).

Defense counsel even considered the possibility of using portions of the statement in his defense of petitioner. Counsel stated to the judge: "Judge I was going to bring that up at another time in a discussion about exactly what we could open to the jury on because the statements I provided you there's a lot of things in there to help to give state of mind for the detectives. . . ." (September 9, 1986 suppression hearing transcript at 38).

The record thus reflects that counsel made an informed decision that these statements did not harm the defense. Furthermore, the failure to file a suppression motion does not *per se* constitute ineffective assistance of counsel. *Kimmelman*, 477 U.S. at 384, 106 S. Ct. at 2587. Viewing defense counsel's actions according to the facts of the case at the time, it cannot be said that defense counsel acted outside the "wide range of professionally competent assistance" by not requesting that the statements be suppressed. *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066.[14]

(2) Ineffectiveness of Counsel in Allowing Hearsay Testimony

Petitioner next alleges that due to defense counsel's deficient performance the hearsay testimony of Beverly Jones was allowed into evidence. Specifically, petitioner alleges that defense counsel's questioning of the witness on cross-examination regarding a fight between the victim and petitioner opened the door for further examination regarding the same incident by

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14. Even assuming trial counsel had acted below the objective standard of effectiveness required by *Strickland*, petitioner has failed to show that but for counsel's ineffectiveness, the result of his trial would have been different. *See* discussion *supra* part (B).

the prosecution. On redirect, based on defense counsel's initial questioning, the prosecution elicited the additional testimony that petitioner had told the victim that he would "get rid of her [the victim] and the baby one way or the other." (January 11, 1989 trial transcript at 56).

Again applying the two-pronged *Strickland* analysis and viewing the conduct from counsel's perspective at the time, it cannot be said that questioning Ms. Jones regarding the fight between the victim and petitioner did not constitute sound trial strategy. Defense counsel made a tactical decision to question the witness regarding an incident in which the victim was the aggressor and struck petitioner in the face with a brick. Defense counsel's attempt to challenge Ms. Jones' testimony through the introduction of this incident could reasonably be calculated to further petitioner's interests. It cannot, therefore, be said that such tactics fell outside the "wide range of professionally competent aasiatance." *Id.*

Accordingly, the Court finds that petitioner was not denied his constitutional right under the Sixth Amendment to effective assistance of counsel.

D. Passion/Provocation Manslaughter Charge to Jury

Petitioner next asserts a violation of his Fourteenth Amendment rights as a result of the trial judge's failure to charge the jury, *sua sponte*, on the lesser included offense of passion/provocation manslaughter. As a result, petitioner claims, he was denied his due process rights.

Generally, a challenge to jury instructions is not cognizable upon habeas corpus review unless the "ailing instruction by itself so infected the entire trial that the resulting conviction

violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 400 (1973); *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 1737 (1977). Under this standard, petitioner bears the burden of showing "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982).

In *Keeble v. Johnson*, 412 U.S. 205, 208, 93 S. Ct. 1993, 1995 (1973), the Court held that due process does not require instruction on a lesser included offense unless the evidence "would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *See also Bishop v. Mazurkiewicz*, 634 F.2d 724, 725 (3d Cir. 1980) ("Constitution [does not] require a jury instruction on lesser included offenses where the evidence does not support it"), *cert. denied*, 452 U.S. 917, 101 S. Ct. 3053 (1981). Under the "Antiterrorism Act":

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (l) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

Under New Jersey law, a criminal homicide can be charged

as passion/provocation manslaughter when the "homicide which would otherwise be murder . . . is committed in the heat of passion resulting from reasonable provocation." N.J.S.A. 2C:11-4(b)(2). Not only did counsel for petitioner not request such an instruction, but an instruction on passion/provocation manslaughter, while a lesser included offense, was not supported by the evidence.

In the instant case, petitioner's defense was complete denial of any involvement in Daye's death. He did not claim responsibility much less argue provocation. The evidence at trial, therefore, based on petitioner's defense of complete denial, failed to lay a factual foundation which would support an instruction of passion/provocation manslaughter had it been requested. *Compare Vujosevic v. Rafferty*, 844 F.2d 1023 (3d Cir. 1988) (evidence supported defendant's request for an instruction of aggravated assault because defendant had testified at trial to committing aggravated assault but had denied responsibility for victim's death).

Accordingly, this Court finds that petitioner's claim that the trial court's failure to charge the jury, *sua sponte*, on passion/provocation manslaughter did not result, under the Antiterrorism Act, "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law. . . ." Pub. L. No. 104-132, sec. 101, § 2254, 110 Stat. 1214. This Court will, therefore, deny petitioner's habeas corpus claim that he was denied due process based upon this ground.

E. Cumulative Errors

Petitioner contends that he was denied a fair trial in violation of the Sixth Amendment because of the cumulative

effect of the errors he alleges occurred both prior to and during trial. Specifically, petitioner points to the admission of the statements he made at the police station on the date of his arrest,[15] the admission of hearsay testimony,[16] inflammatory statements by the prosecutor during summation, and the prosecutor's vouching for the credibility of witnesses. This Court only finds it necessary to address petitioner's contentions of prosecutorial misconduct, as the first two bases alleged have previously been found by this Court to be without merit.

A prosecutor's conduct will serve as grounds for granting a writ of habeas corpus if the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Greer v. Miller,* 483 U.S. 756, 765, 107 S. Ct. 3102, 3108 (1987). In *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 1871 (1974), the Supreme Court emphasized that "not every trial error or infirmity . . . constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.' "

In the instant case, petitioner alleges prosecutorial misconduct in the form of prejudicial comments made by the prosecutor during summation but has failed to provide evidence to support his claim. Additionally, petitioner claims the prosecutor vouched for the credibility of witnesses. However, petitioner has failed to furnish any supporting evidence or explanation as to how he was prejudiced. An examination of the record reveals no evidence of egregious prejudicial comments by the prosecutor during summation which would amount to a denial of petitioner's due process

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15. *See* discussion *supra* parts (B) and (C) (1).

16. *See* discussion *supra* part (C).

rights. *See Ramseur v. Beyer*, 983 F.2d 1215, 1239 (3d Cir. 1992), *cert. denied*, 508 U.S. 947, 113 S. Ct. 2433 (1993).

The trial judge specifically commended counsel's performance during the trial, stating directly to the jury members: "You had the benefit of two of the best counsel I have seen in my court in a long time. . . . (September 13, 1989 trial transcript at 97). In sum, the prosecutor's conduct did not appear to rise to a level of conduct so gross as to amount to a denial of due process, especially when placed in the context of the trial as a whole. *See Greer*, 483 U.S. at 767 (noting importance of placing improper conduct in context of trial as a whole). The weight of the evidence against petitioner was heavy; the circumstantial and blood evidence supported a finding of guilt on all charges.

Accordingly, because this Court has found that none of the errors alleged by petitioner have any merit, there can be no cumulative error resulting in a denial of his Sixth Amendment constitutional right to a fair trial.

CONCLUSION

After careful review of the record, the Court is satisfied that there has been no infringement of petitioner's constitutional rights. Accordingly, the Court will deny the petition for a writ of habeas corpus.

An appropriate order is attached.

Dated: July 31, 1996

s/ Alfred M. Wolin
ALFRED M. WOLIN, U.S.D.J.

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JULY 31, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No.
95-1800

GLADSTONE MESSAM,

Petitioner,

v.

WILLIS MORTON, et al.,

Respondents.

ORDER

In accordance with the Court's Memorandum Opinion filed herewith,

It is on this 31st day of July, 1996

ORDERED that Gladstone Messam's petition for a writ of habeas corpus is denied.

s/ Alfred M. Wolin
Alfred M. Wolin, U.S.D.J.

APPENDIX H — ORDER DENYING PETITION FOR CERTIFICATION OF THE SUPREME COURT OF NEW JERSEY FILED JUNE 25, 1992

SUPREME COURT OF NEW JERSEY
C-1073 September Term, 1991
34,962

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GLADSTONE MESSAM,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-166-89T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 23rd day of June, 1992.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX I — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED FEBRUARY 26, 1992

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-166-89T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GLADSTONE MESSAM,

Defendant-Appellant.

Submitted November 18, 1991 — Decided FEB 26 1992

Before Judges J.H. Coleman, Stern and Keefe.

On appeal from the Superior Court of New Jersey, Law Division, Essex County.

Wilfredo Caraballo, Public Defender, attorney for appellant (Stephen W. Kirsch, Assistant Deputy Public Defender, of counsel and on the brief and reply brief).

Supplemental *pro se* brief and reply brief filed by appellant.

Appendix I

Herbert H. Tate, Jr., Essex County Prosecutor, attorney for respondent (Barbara A. Rosenkrans, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant was indicted for murder, *N.J.S.A.* 2C:11-3a(1) and (2) (count one), unlawful possession of a weapon, *N.J.S.A.* 2C:39-5d (count two), and possession of a weapon for unlawful purpose, *N.J.S.A.* 2C:39-4d (count three). His motion to suppress was granted by the trial judge, but we reversed, and the Supreme Court dismissed defendant's petition for certification. Defendant was thereafter convicted by jury on all charges. The weapons convictions were merged with the murder conviction and defendant was sentenced to life imprisonment with 30 years to be served before parole eligibility. A $500.00 Violent Crime Compensation Board penalty was also imposed.

On this appeal defendant argues:

POINT I DEFENDANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF PASSION/PROVOCATION MANSLAUGHTER DESPITE THE CLEAR INDICATION FROM THE RECORD OF THE NEED FOR THE CHARGE. (Not Raised Below).

POINT II THE ASSISTANT PROSECUTOR'S SUMMATION VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY ACCUSING DEFENSE COUNSEL OF DEFENDING A CLIENT WHOM HE KNEW TO BE GUILTY, AND DEMEANING DEFENSE COUNSEL'S ROLE IN THE PROCEEDINGS; DEFENDANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE ALSO VIOLATED WHEN THE PROSECUTOR VOUCHED FOR THE CREDIBILITY OF HIS WITNESSES BASED ON MATTERS WHOLLY OUTSIDE THE EVIDENCE AND TOLD THE JURORS THAT THEY HAD A DUTY TO CONVICT IN ORDER TO DO JUSTICE. (Partially Raised Below).

POINT III THE EVIDENCE SEIZED FROM THE CAR DEFENDANT DROVE TO THE POLICE STATION WAS SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND ARTICLE I, PARA. 7 OF THE NEW JERSEY CONSTI-TUTION AND SHOULD HAVE BEEN SUPPRESSED.

In a *pro se* supplementary brief he also contends:

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POINT I — THE TRIAL JUDGE ERRED IN ALLOWING THE ADMISSION OF HEARSAY STATEMENTS BY THE VICTIM'S COUSIN CONCERNING THREATS MADE BY THE DEFENDANT.

POINT II — THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY ON THE LAW OF MURDER. (Not Raised Below).

POINT III — DEFENSE COUNSEL'S FAILURE TO ADEQUATELY ARGUE THE PROPER THEORY OF LAW, ON THE VOLUNTARINESS OF THE CONSENT TO SEARCH ISSUE, DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

POINT IV — DEFENDANT ARGUES POLICE INTERROGATION WAS CONDUCTED ILLEGALLY AND STATEMENTS STEMMING FROM THIS INTERROGATION SHOULD NOT HAVE BEEN USED AT TRIAL IN VIOLATION OF DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION. (*U.S. CONST.* AMENDS. V, XIV; *N.J. CONST. (1947) ART. I, PAR. I*) (Partially Raised Below).

Our careful review of the record convinces us that these arguments are without merit and do not warrant extended discussion, *R.* 2:11-3(e)(2), except to the extent noted.

Appendix I

A brief recitation of the facts is necessary with respect to the claims we find necessary to discuss. The case involved the death of Rhonda Daye in September 1984.

Defendant owned the Subway Sandwich Shop located at 1 Sussex Avenue, Newark. He employed Rhonda Daye who worked at the sandwich shop and during 1984 lived in the apartment over the shop. During the course of her employment defendant and Rhonda had a "relationship," and Rhonda informed defendant that she was pregnant. She was about 4 1/2 months pregnant at the time of her death. Defendant testified at trial that when Rhonda told him of her pregnancy he said "what are you telling me for, I had sex with you a couple of times and I used condoms. I'm not going to pay for it."

Rhonda "had some spotting" during the pregnancy and her doctor "put her on bed rest." Because of her pregnancy Rhonda was no longer able to work but defendant apparently had asked her to leave his employment because Rhonda failed to "get along with the other people" at work. In any event Rhonda attempted to get defendant to sign for unemployment benefits for her. At trial defendant maintained that he did not know anything about Rhonda's application for unemployment benefits until she came to the sandwich shop one evening and accused him of filling out forms "saying she was fired" which resulted in a denial of benefits. He denied making any report to "State unemployment."

At trial Beverly Jones, Rhonda's cousin, testified that Rhonda told her that she and defendant argued about defendant not signing "something for her to get her unemployment." Ms. Jones stated that Rhonda had also told her defendant "was upset" about Rhonda's pregnancy and her desire to keep the baby,

causing an argument during which Rhonda hit defendant with a brick. Ms. Jones further testified that Rhonda told her defendant said she "wasn't going to have the baby, that he'd get rid of her and the baby one way or the other."

On September 24, 1984 Detective Gary Miller of the Newark Police Department Homicide Squad responded to a call directing him to "the area of 85 South Orange Avenue in the City of Newark." There in a vacant building Detective Miller observed the body of a female "bare to the waste," with "multiple stab wounds of the neck, chest, . . . hands and . . . face." In the immediate vicinity of the vacant building the police found stationery and envelopes with the heading "Subway Sandwich Shop," along with a "trail of blood which led from the curbside" to the vacant building. Other items of evidence discovered by police upon further investigation included a comb, a popcorn box and an orange juice container, all stained with drops of blood.

Rhonda's mother testified that on Sunday, September 23, 1984 she was concerned because she had not seen her daughter for three days. According to Ms. Daye, on Sunday, the 23rd of September, Rhonda was supposed to baby sit for Ms. Daye's younger son. When Rhonda did not appear at her mother's house, Ms. Daye called the sandwich shop and had Donald Nesbeth (defendant's brother who also worked at the sandwich shop) call for Rhonda "at the window" of her apartment. There was no response.

The next day Ms. Daye went to the sandwich shop and apartment looking for Rhonda. Ms. Daye later called defendant to ask about Rhonda's whereabouts. Defendant told Ms. Daye he had not seen Rhonda since Saturday. Ms. Daye asked

defendant if he or the "super" had a key to Rhonda's apartment. Defendant replied that neither he nor the "super" had a key, but if Ms. Daye would come to the sandwich shop on Tuesday morning he (defendant) would help her "break the door" to the apartment.

Ms. Daye subsequently saw two detectives in the area and explained to them that her daughter was missing. One of the detectives Ms. Daye spoke with was Miller who was investigating the death of the person found in the deserted building on South Orange Avenue. The detectives thereupon entered Rhonda's apartment and discovered clothes on the bed, a broken mirror on the floor, food on the stove and a note written by Rhonda to defendant's wife. In the note Rhonda stated that she had had an affair with defendant (Loyd) and that "I am pregnant by your husband."

After Rhonda's body was identified, Detective Miller and an associate went to the Subway Sandwich Shop and asked defendant if he knew the deceased, to which he replied yes. Defendant told police he had not seen Rhonda since Friday. Then detectives requested that defendant accompany them to police headquarters to provide a "formal" statement. Defendant acquiesced and requested to drive his own car to police headquarters because it was double parked and had to be moved. Detective Miller asked defendant if it was "all right" to ride to the station with defendant and defendant agreed.

When defendant unlocked and opened the passenger door for Detective Miller, the detective noticed a "pile" of papers on the front seat of the car with "a few blood spots on it." Defendant put the pile of papers in the back seat and drove to headquarters with Detective Miller.

Appendix I

At the police station defendant said he had last seen Rhonda on the previous Friday. According to Miller, he admitted that he knew Rhonda was pregnant, said that she left work "[b]ecause she was pregnant" and that she claimed he was the father of her unborn child. Defendant, however, declined to discuss their relationship. Detective Miller then asked defendant about the bloodstained papers in defendant's car. Defendant claimed to have no knowledge of the bloodstains yet stated that no one else had driven his car. At trial defendant testified that Miller "demanded" that he accompany Miller to headquarters and denied saying that Rhonda told her he was the father or that no one else drove the car.

Detective Miller asked defendant for permission to conduct a search of defendant's vehicle. According to both Miller and Messam, defendant consented to the request and signed a consent form. As a result of the search, the detectives found "twelve pieces of bloodstained . . . business papers" and two bloodstained coffee mugs.

After the car search[1] Miller also noted that defendant was wearing bloodstained "brush leather work boots" which were "seized." At that point defendant was arrested and "advised of his constitutional rights by reading him the *Miranda* warnings."

1. In our prior opinion based on the motion to suppress, we noted that the bloodstains on the boots were "noticed" "[a]fter" the physical evidence was taken from the car and that "[d]efendant was then advised of his rights as required by *Miranda v. Arizona*, 384 *U.S.* 436 (1966)." The timing was not fully explored at trial. A defendant, "even in a non-custodial situation," must know of his right not to consent. *State v. Johnson*, 68 *N.J.* 349, 353-54 (1975). However, defendant testified at trial "I told [Miller] I had nothing to hide. He asked, can I go and search the car . . . [y]es, I gave him permission."

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At trial a forensic scientist testified for the State that the bloodstains on defendant's work boots were "positive for blood of human origin." He further testified that the stains on the papers found in defendant's car and the stain on one of the coffee mugs were also "positive for human origin." Another forensic expert concluded that the blood found on some of the papers and one of the mugs contained enzymes that were consistent with Rhonda's, but not defendant's, blood.

Defendant testified on his own behalf. He admitted having intercourse with Rhonda "twice," both times while using "condoms." He therefore denied any concern for impregnating the victim. He also denied stabbing Rhonda or knowing who did.

Defendant relies on *State v. Vauricio,* 117 *N.J.* 402 (1990), to support his claim that the conviction must be reversed in the absence of a charge on "passion/provocation" manslaughter. In *Mauricio* the Supreme Court held that passion/provocation manslaughter had to be charged to the jury, upon request, where the evidence reflected a knowing or purposeful homicide after reasonable provocation. However, as a prerequisite to such a charge four factors must be presented by the evidence, "the provocation must be adequate; the defendant must not have had time to cool off between the provocation and the slaying; the provocation must have actually impassioned the defendant; and the defendant must not have actually cooled off before the slaying." *Id.* "If a slaying does not include all of those elements, the offense of passion/provocation manslaughter cannot be demonstrated." *Id.* at 411. The first two requirements of this standard are objective and the evidence must support them, while the last two requirements are subjective and must be left to the jury's determination. *Id.* at 412, 413.

Appendix I

Defendant claims that the components of passion/provocation manslaughter were satisfied. He asserts that Rhonda's threat to tell the defendant's wife about the affair constituted adequate provocation and that events occurred so fast that he had no time to "cool off." Defendant points to the condition of the victim's apartment when the police finally gained admittance. The water was running in the sink; the stove, the television and the oven were on; the victim's wallet was in the apartment and a note in the victim's handwriting to defendant's wife outlining the affair all point to an abrupt, violent scenario. Further, defendant notes that a broken mirror on the floor could be evidence of a struggle.

We reject the contention. The victim's verbal threat to write defendant's wife about the affair and resulting pregnancy does not constitute provocation. The victim's threats constituted nothing but words, and our Supreme Court has noted "words alone, no matter how offensive or insulting" cannot constitute such provocation as to reduce murder to manslaughter. *State v. Chrisantos (Arriagas)*, 102 *N.J.* 265, 274 (1986). Further, the defendant never requested that the judge charge the jury on passion/provocation manslaughter, and this fact is significant. *State v. Pridgen*, 245 *N.J. Super.* 239, 249-250 (App. Div. 1991), *certif. denied* __ *N.J.* __ (1991). *See also State v. Mauricio, supra*, 117 *N.J.* at 417-418 ("where a defendant requests a charge on passion/provocation manslaughter as a lesser-included offense of murder, the trial judge should instruct the jury on that form of manslaughter if an examination of the record discloses that the evidence satisfies the rational-basis standard . . . ."); *State v. Choice*, 98 *N.J.* 295 (1985); *compare, State v. Coyle*, 119 *N.J.* 194 (1990). In *Mauricio*, "the trial court's failure to have delivered the *requested* charge amounted to reversible error." 117 *N.J.* at 418 (emphasis added).

Appendix I

We find no plain error warranting reversal in the absence of a *sua sponte* charge on the passion/provocation manslaughter. This is particularly true in light of the defense. Defendant testified and expressly denied killing the victim. He did not suggest involvement, much less provocation. While in other circumstances a trial judge must *sua sponte* charge a lesser-included offense where warranted by the evidence even if inconsistent with the case as presented by the parties, *see State v. Powell*, 84 *N.J.* 305 (1980), we cannot conclude that the judge should have charged it here where it may well have prejudiced the defense strategy.[2]

Defendant claims that the prosecutor's summation violated his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process because the prosecutor accused defense counsel of representing a guilty client, belittling defense counsel's role in the trial, vouching for the credibility of his witnesses and telling the jurors that justice demanded the conviction of defendant. The defendant objects to the prosecutor's summation which referred to legal teaching that when all else fails in the defense of a criminal client "blame [the crime] on someone else."

Defendant relies on *State v. Sherman*, 230 *N.J. Super.* 10 (App. Div. 1988), where the prosecutor accused defendant and his counsel of conspiring to "conceal and distort the truth." *Id.* at 19. Here defendant insists the prosecutor acted in a similar fashion. In *Sherman* the prosecutor's improper comments found

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2. It is significant that, given the importance of a request for instructions, defendant does not argue incompetency of counsel in not requesting a passion/provocation charge. Such a charge would have been inconsistent with defendant's claim that he was not involved in the killing.

no support in the evidence and were repetitive. Here the prosecutor's fable of the law school professor's advice, when all else fails, to blame the crime on someone other than the defendant was a response to a contention raised by defense counsel. Throughout the cross examination of Detective Gary Miller, defense counsel attempted to show that the police failed to follow up leads which may have led to the arrest of a perpetrator other than defendant. The prosecutor's summation without relevant objection can therefore in context be read as a response to the fact that defense counsel was seeking to exculpate defendant by showing that someone else could have killed the victim. We do not conclude that what the prosecutor said was proper. However, "in the context of the summation as a whole, we cannot say that the prosecutor's comments . . . den[ied] defendant a fair trial." *State v. Knight,* 63 *N.J.* 187, 193 (1973).

Our prior determination on the suppression issue constitutes the ". . . of the case." Defendant now asserts that he is entitled to relief because he was not competently represented on the prior appeal. However, he has not demonstrated that the results of the State's interlocutory appeal would have been different had he been represented by other counsel. *See State v. Fritz,* 105 *N.J.* 42, 52 (1987). In any event, the remedy for ineffective assistance of appellate counsel would be a new appeal, not a new trial, unless the results of the appeal would have been different; and nothing presented on this appeal suggests that we would have reached a different conclusion on the prior appeal, had a different argument been made concerning the search issue.

Defendant claims that a trial the statement made by the victim's first cousin Beverly Jones relating to defendant's threat

to the victim that defendant would "get rid of [victim] and the baby one way or the other" was inadmissible.

During the cross-examination of Ms. Jones, defendant asked if she recalled the victim telling her about why Rhonda had hit defendant with a brick. Ms. Jones responded "[y]es, I remember her telling me something about it." She was then asked if the victim had ever discussed arguments she had with other employees at the Sandwich Shop. Ms. Jones responded "[n]o, she told me she had got into with Loyd because he tried to stop her from drawing unemployment, or something like that" to which defense counsel countered with "[a]nd because he did that, she struck him in the face with a brick?" Jones answered "I'm not saying that's why she hit him with the brick." Thereafter, on redirect the prosecutor asked Ms. Jones to tell us what Rhonda told you about "the argument she had with Loyd about the brick," to which Jones responded:

> She asked me something about — she had said something about he didn't sign something for her to get her unemployment, or something like that, and he was upset due to the fact she was pregnant and that she wanted to have the baby and she said that that's when she got into the argument with him and she hit him with the brick and he said something about she wasn't going to —
>
> And she told me that Loyd said she wasn't going to have the baby, that he'd get rid of her and the baby one way or the other.

The trial judge overruled defendant's hearsay objection, stating "[y]ou asked about what the fight was about and what Rhonda

allegedly struck Mr. Messam with. I will permit it." The testimony was in direct response to the defendant's cross-examination, and while no limiting instruction was given, none was requested. In any event, we do not believe that the introduction of this evidence was unduly prejudicial or warrants reversal, given the totality of the State's proofs.

The judgment of conviction is affirmed.

APPENDIX J — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED MAY 22, 1997

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-923-86T5
MOTION NO. M-4062-86
BEFORE PART: A
JUDGE(S): ANTELL
D'ANNUNZIO

STATE OF NEW JERSEY

VS

GLADSTONE MESSAM

ORDER ON MOTION

MOTION FILED: May 4, 1987

* * *

SUBMITTED TO COURT: MAY 20, 1987

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 21st DAY OF May, 1987, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT/FOR RECONSIDERATION AND TO FILE SAME NUNC PRO TUNC ☒ DENIED

Appendix J

SUPPLEMENTAL: Our disposition of the issues was not inadvertent. The order under review simply directed "that the motion to suppress evidence be and the same is hereby granted in part." We ruled that "the order under review dated September 9, 1986 suppressing evidence is reversed. . . ." Although the State requested in the conclusion of its appellate brief that we "reverse the trial court order suppressing the oral statements . . . ," this issue was nowhere argued in its brief. Moreover, it appears from the transcript of the proceeding below that the defendant did not pursue any request for suppression of his oral statements and it does not appear that such relief was the subject of the trial court's order. Not having been furnished with a copy of defendant's moving papers we cannot say whether it was ever requested.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

s/ illegible
Acting Clerk

FOR THE COURT:

s/ Melvin P. Antell
MELVIN P. ANTELL

APPENDIX K — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED FEBRUARY 13, 1987

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-923-86T5

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

GLADSTONE MESSAM,

Defendant-Respondent.

Submitted January 27, 1987 — Decided

Before Judges Antell and D'Annunzio.

On appeal from Superior Court, Law Division, Essex County.

Herbert H. Tate, Jr., Essex County Prosecutor, attorney for appellant (Marc J. Friedman, Assistant Prosecutor, of counsel and on the brief).

Robert L. Brown, attorney for respondent (Mr. Brown of counsel and on the brief).

Appendix K

PER CURIAM

Defendant herein is under indictment for murder, *N.J.S.A.* 2C:11-3a(1), (2), unlawful possession of a weapon, *N.J.S.A.* 2C:39-5d, and possession of a weapon for an unlawful purpose, *N.J.S.A.* 2C:39-4d. By our leave granted the State appeals from an interlocutory order suppressing evidence seized in a warrantless search of his automobile. The State contends that the search was conducted with defendant's knowing and voluntary consent and was therefore excepted from the rule requiring the prior issuance of a search warrant. *See State v. Johnson,* 68 *N.J.* 349, 352 (1975); *State v. King,* 44 *N.J.* 346, 352 (1965).

Investigating the homicide of Rhonda Daye, Newark police visited defendant at his place of business. They had learned from others that Daye had become pregnant as a result of her intimate relationship with defendant and that defendant had been insisting she submit to an abortion. On the basis of this and other information police interest focused on defendant as a suspect.

After preliminary questions, police asked defendant to accompany them to headquarters, presumably for further questioning. Defendant agreed to go, but said that he would prefer to drive in his own car. Because he did not know the way to the station he agreed to have one of the detectives ride with him. When the detective entered the car he saw defendant pick up a pile of papers, some of which were bloodstained, from the front seat and place them in the rear. At headquarters defendant was asked about these, but could not explain their presence. Defendant, who has had some college education, was then asked to read and sign a consent to search document, which was also read to him. It contains the following statement:

Appendix K

I, Gladstone Lloyd Messam, having been informed of my constitutional right not to have a search made of the premises, hereinafter mentioned, without a search warrant and of my right to refuse to consent to such a search, hereby authorize Detective Gary Miller and Detective Charles Whitner police officers of the City of Newark, County of Essex, State of New Jersey to conduct a complete search of my premises located at (82 Honda-NJ Plate #355STZ-VIN #C070160) 22 Franklin Street (Parking Lot) Newark New Jersey.

These officers are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above named police officers voluntarily and without threats or promises of any kind.

After the foregoing paper was signed by defendant the officers searched the car and found twelve pieces of bloodstained paper and two coffee mugs, one of which also bore bloodstains. Bloodstains were also observed on the outside of the car. After taking possession of the physical evidence the detectives notices bloodstains on the defendant's shoes and removed them for testing. Defendant was then advised of his rights as required by *Miranda v. Arizona,* 384 *U.S.* 436 (1966) and he thereafter declined to answer any further questions.

The suppression order under review was based on the trial judge's belief that the police search was illegal because defendant's consent to search had not been preceded by

administration of the *Miranda* warnings. Our analysis of the situation differs from that of the trial judge and we conclude that the giving of a *Miranda* warning is not a constitutional prerequisite to the validity of a consent to search.

To sustain a consent to search the State is required to show that the consent was voluntary, that defendant knew of his right not to consent and knowingly intended to relinquish the right. *State v. Johnson, supra,* 68 *N.J.* at 353-354. The evidence seized pursuant to a search is real and physical and nontestimonial in nature. The requirement for *Miranda* warnings is applicable only to testimonial evidence secured as the result of custodial interrogation. As the court stated in *Hubbard v. Jeffes,* 653 *F.*2d 99, 103 (3d Cir. 1981),

> The absence of *Miranda* warnings does not vitiate consent to a seizure of personal property, because the *Miranda* protections are addressed to constitutional rights that are distinct from Fourth Amendment rights. Solicitude for individual privacy is the central thrust of the Fourth Amendment. *Katz v. United States,* 389 *U.S.* 347, 88 *S. Ct.* 507, 19 *L. Ed.* 2d 576 (1967). Privacy rights must be balanced, however, against the interest of the community "in encouraging consent [to a search], for the resulting search may yield necessary evidence of the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongfully charged with a criminal offense." *Schneckloth* [*v. Bustamonte,*] *supra,* 412 *U.S.* [218] at 243, 93 *S. Ct.* [2041] at 2056 [, 36 *L. Ed.* 2d 854 (1973)]. Inasmuch as the integrity of the fact-finding process may be enhanced by admitting evidence recovered

> from a search or seizure, the Supreme Court has not required a stringent standard for measuring voluntariness in the Fourth Amendment context.

See also State v. Chappee, 211 *N.J. Super.* 321, 333-334 (App. Div. 1986); *State v. DeLorenzo*, 210 *N.J. Super.* 100, 104-105 (App. Div. 1986). "The prevailing and better view" is if a consent to search is obtained from a person even when he is in custody, such police conduct is not subject to the requirements of *Miranda*. 2 *LaFave, Search and Seizure*, § 8.2 at 671-672 (1978).

> As we see it the answer to the problem before us depends on whether by requesting and obtaining the defendant's consent for the search of his apartment the police violated a value which *Miranda* was designed to protect. The question is not whether, had the *Miranda* warnings been given, would defendant have consented to the search. It may well be that, after being advised of his rights, he would have decided not to cooperate with the police in any way until he had a chance to confer with counsel. * * *
>
> Reasonable minds may differ as to what the Supreme Court attempted to achieve in *Miranda*. * * * However one interprets *Miranda*, what becomes subject to exclusion when a warning is not given although the situation calls for one, are "statements, whether exculpatory or inculpatory, stemming from custodial interrogation." * * * A consent to search, as such, is neither testimonial, nor communicative in the Fifth Amendment sense. If

> appearing in a lineup and speaking words used by a robber is not a "disclosure of any knowledge [the accused] might have" * * *, neither is a consent to search. The fact that the search leads to incriminating evidence does not make the consent testimonial, any more than the victim's identification at the lineup gives such a quality to the words spoken by the suspect. [*Id.* at 672 (quoting *People v. Thomas*, 12 *Cal. App.* 3d 1102, 91 *Cal. Rptr.* 867 (Cal. Ct. App. 1970))].

We conclude that the legality of the search must be determined by whether defendant's consent thereto was knowingly and voluntarily given. The answer to this question is not controlled by whether the consent was preceded by the giving of *Miranda* warnings but by a broad view of all the evidence bearing thereon. From our study of the transcript we are satisfied that defendant offered nothing beyond the absence of *Miranda* warnings to support any claim that his consent was involuntary. Accordingly, the order under review dated September 9, 1986 suppressing evidence is reversed and the matter is remanded to the Law Division for further proceedings.

APPENDIX L — LETTER REPLY BRIEF OF GLADSTONE MESSAM DATED DECEMBER 23, 1986

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
INDICTMENT NO. A-923-86T5

STATE OF NEW JERSEY,

Plaintiff-Movant,

vs.

GLADSTONE MESSAM,

Defentant-Respondent.

CRIMINAL ACTION

ON APPEAL FROM AN INTERLOCUTORY ORDER OF
THE SUPERIOR COURT, LAW DIVISION,
ESSEX COUNTY

SAT BELOW: HON. MICHAEL J. DEGNAN, J.S.C.

LETTER REPLY BRIEF ON BEHALF OF THE
DEFENDANT-RESPONDENT GLADSTONE MESSAM

* * *

Appendix L

STATEMENT OF PROCEDURAL HISTORY

The defendant, Gladstone Messam, was indicted by the Essex County Grand Jury on December 13, 1984. He was charged in three counts with murder (*N.J.S.A.* 2C:11-3a(1) and (2)), unlawful possession of a weapon (*N.J.S.A.* 2C:39-5d), and possession of a weapon for an unlawful purpose (*N.J.S.A.* 2C:39-4d). A superseding indictment was returned on August 29, 1985, charging the same violations (Pa1).

A Motion to Suppress was filed and heard on September 9, 1986, by the Honorable Michael J. Degnan, J.S.C. The motion was granted in part on that same day (Pa5). The State's Motion for Stay of Trial was granted by Judge Degnan to give the State the opportunity to seek leave to appeal. This letter brief is submitted in opposition to the State's Motion for Leave to Appeal.

COUNTER-STATEMENT OF FACTS

On September 25, 1984 Detective Gary Miller was investigating the homicide of Rhonda Daye (T5-6 to T6-4). Detective Miller received the following information during the course of his investigation prior to meeting with the defendant at his place of business: (1) the victim was stabbed to death (T63-3 to 7); (2) blood stained documents related to the defendant's business were found at the scene where the body was found (T65 - 8 to 9); (3) the victim was allegedly pregnant (T66-9 to 13) by the defendant (her boyfriend); (4) the defendant was married but not to the victim (T66-9 to 13); (5) letters were found written by the victim to the defendant's wife which addressed the subject of her pregnancy and relationship with the defendant (T66-9 to 13); (6) a friend of the victim's had

indicated the victim told her the defendant had threatened to get the baby out of her one way or another in that he wanted her to have an abortion and she refused (Pa 17); (7) a love triangle was a possible motive for the defendant killing the victim (T31-16 to 25; T32-10 to 25; T33-1 to 6); and (8) the defendant was the only murder suspect (T39-16 to 21).

Armed with this information, Detective Miller went with Detective Whitner to the Subway Sandwich Shop at approximately 8:05 p.m. to speak with the defendant (T5-19 to 25). Detective Miller identified himself to the defendant (T6-13 to 19) and asked about Rhonda Daye. After the defendant stated that he knew Rhonda, Miller explained that he wanted to ask a few questions (T7-1 to 3). The defendant stated that Rhonda used to work for him, but no longer did (T7-13 to 14). He claimed that he had last seen her on Friday (T7-15 to 16).

Detective Miller told the defendant Rhonda Daye was missing and no one had seen her and he would like to talk to him about it. (T40-7 to 18). He further indicated to the defendant the police wanted to document the information of when he last saw the victim and what clothing she was wearing. (T48-11 to 15).

The defendant asked if he could take his own car which was double parked (T8-2 to 4). Also, he stated that he did not know where headquarters was located (T8-6). Miller asked the defendant if he could ride in the defendant's car and the defendant agreed (T8-6 to 9). The defendant was not under arrest (T8-12).

As Miller and the defendant entered the car, the defendant picked up a pile of papers in the front seat and placed them in

the rear (T9-6 to 8). The detective noticed bloodstains on the papers (T11-22 to 25). Miller gave the defendant directions to headquarters (T9-13 to 15). They parked in the non-public police lot (T9-18 to 19) and went inside (T10-4).

They arrived in the Homicide Squad at 8:35 p.m. (T10-7 to 11). The defendant told Miller that he had last seen Rhonda the previous Friday at 7:30 p.m. (T10-16 to 17). He had taken her to a store on High Street to purchase soda (T10-19 to 21) and returned with her to his store. That was the last time he claimed to have seen her (T10-22 to 23).

Detective Miller and Detective Whitner also questioned the defendant about his whereabouts; whether the victim worked at his business; whether the victim was pregnant by him; the intimate relationship between the victim and the defendant; (T56-5 to 9, T57-2 to 6, 19 to 22). Eventually Detective Miller asked the defendant about the spots of blood on the paper, on his car and did anyone else use his car. The defendant couldn't explain where the blood came from (T64-1 to 7) Defendant allegedly stated no one else used his car (T13-3 to 4).

The failure of the defendant to explain the origin of the blood was the reason Detective Miller decided to search the car through a consent to search form (T66-18 to 67-1 to 10; T-71-10 to 19).

The defendant was asked to read a form constituting a consent to search the car (T13-6 to 7). After the defendant read it himself (T14-1), Miller read it to him (T14-2 to 3). The defendant said he could read and was college educated (T14-9 to 10). The consent to search was signed in Miller's presence (T14-11 to 12).

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Detective Miller searched the car (T14-13 to 14) and found twelve pieces of blood stained paper, a Fortunoff coffee mug with blood stains, and a Yorkie coffee mug with blood stains (T14-23 to T15-3). Also found were bloodstains on the outside of the car (T15-9 to 10).

Miller went back inside headquarters (T15-24) and saw blood on the defendant's shoes (T16-8 to 10). The shoes were confiscated (T16-11).

The defendant was then advised of his rights and again was asked by Detective Miller where the blood stains came from (T16-14 to 16). The defendant said he did not want to talk anymore (T16-19). The questioning ceased (T17-14 to 16.) and he was arrested (T17-23 to 25). In the defendant's wallet was found a piece of paper with a handwritten message on it (T18-10 to 11).

The trial judge suppressed all items seized as a result of the alleged consent search, except the papers seen by Detective Miller when he first entered the defendant's car.

POINT I

WHERE PROBABLE CAUSE EXISTED TO ARREST DEFENDANT MIRANDA WARNINGS WERE REQUIRED BEFORE QUESTIONING OF HIM

Defendant recognizes the black letter law at this point, that persons subjected to custodial police interrogation must be advised of their constitutional rights of self-incrimination and right to counsel. Miranda v. Arizona, 384 U.S. 436 (1966).

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This is obviously the law in New Jersey Johnson v. New Jersey, 384 U.S. 719 (1966). These warnings are not normally required where questioning is associated with motor vehicle laws and violations thereof. State v. Lewin, 163 N.J. Super. 439 (A.D. 1978). Although where a motorist is detained for a traffic stop and thereafter is subjected to treatment that renders him in custody for practical purposes, he will be entitled the full panoply of protections perscribed by Miranda. Berkemer v. McCarty, 468 U.S. 420 (1984). The defendant also recognizes no precise formulation of the miranda warnings is required. California v. Prysock, 453 U.S. 355 (1981), State v. Adams, 200 N.J. Super. 385 (A.D. 1985).

a. The Central Issue Of Custody

The parties herein admit the central issue herein is whether there was in fact a "custodial" interrogation of the defendant at Police Headquarters. It is clear custodial interrogations are not limited to the police station. Ovozo v. Texas, 394 U.S. 324 (1969). The sense of Miranda is that custodial interrogation; rather than a mere 'focus' upon a particular suspect is what will generate the right to advice about, and the offer of counsel." (Footnote 1 P. 501 to 502) State v. Williams, 59 N.J. 493 (1971).

Recognizing the above-stated concepts the question as to what custody is must be answered. However, the law of this State counsels that these must be a case by case determination of custodial interrogation. State v. Godfrey, 131 N.J. Super. 168 (A.D. 1974) aff. 67 N.J. 267 (1975).

In the instant case the State contends in its brief there was no custodial interrogation, because the defendant voluntarily

appeared at the police station and was not placed under arrest and therefore the defendant was not significantly "deprived of his freedom of action". (T8-1 to 15)

The State recognized State v. Godfrey, supra in its brief but ignores its teachings. The Court at P. 79 therein with very similar facts opined the following:

> Thus, the initial inquiry is, 'Was defendant in custody or was he deprived of his freedom of action in a significant way?'
>
> It is clear that custody in the *Miranda* sense does not necessitate a formal arrest, nor does it require physicial restraint in a police station, nor the application of handcuffs, and may occur in a suspect's home or a public place other than a police station. [citation omitted] (pages 78-79)
>
> We are satisfied that no precise definition can be formulated which would apply in advance to all cases and prescribe the outer limits of the protection afforeded. The problem must be dealt with through a case-by-case approach in which the totality of the circumstances must be examined.
>
> The Supreme Court in the *Miranda* opinion referred to many of the methods of police investigation which impelled them to formulate the necessary preinterrogation occurring in a room cut off from the outside world; a police dominated atmosphere. These facts, coupled with defendant's knowledge of the negative results of his polygraph

test, are significant when considering whether defendant 'was taken into custody or otherwise deprived of his freedom of action in any significant way' so as to require the administration of the fourfold *Miranda* warning.

It cannot be seriously argued that after the police had administered a polygraph test to defendant, and as a result thereof were in possession of information indicating to them that (1) defendant had lied to them, (2) defendant was present at the shooting and (3) defendant was actually the man who shot Frazier, they would have permitted him to walk from the inner office where he had been placed by Upshaw and out of the police station. Statements by the detectives to that effect are incredible and not worthy of belief.

We accordingly agree with the finding of the trial judge that at the conclusion of the polygraph test, when the detectives learned defendant had lied about his involvement in the affair, he was from that point forward deprived of his freedom of action in a significant degree and was entitled to full *Miranda* warnings before any statement made by him thereafter could be considered voluntary. (pages 79-80)

b. The Instant Case

The Trial Court simply found the police had probable cause to arrest the defendant at the time they observed the blood stained paper in his car (2T33-11 to 20) in that the police already knew: (1) Blood-stained papers related to these defendant's

business were found at the murder scene, (2) the victim had been stabbed to death, (3) the defendant was married and the victim was allegedly pregnant by defendant, (4) the victim was writing letters to the defendant's wife about her adulterous relationship with defendant, (5) the victim had indicated the defendant threathened to get the baby out of her one way or another, and (6) the defendant was asked to respond to the police station to provide information on a missing person. The law of this State as to probable cause for arrest clearly supports the Trial Court's finding. Probable cause for arrest exists where a police officer has a well founded belief or suspicion of guilt. State v. Sheffield 62 N.J. 441 (1973); State v. Gagen, 162 N.J. Super. (A.D. 1978); State v. Bates, 202 N.J. Super. 416 (A.D. 1985).

The Trial Court in effect as in Godfrey, supra opined at the point probable cause existed for arrest and the defendant was in the immediate presence of the police the defendant from that point forward was deprived of his freedom of action to a significant degree requiring *Miranda* warnings.

The State argues in effect that at the point where probable cause for arrest existed for a murder charge the defendant could have left the police station at any time he chose. The *Godfrey* Court at P. 177 responded best to this argument: "Statements by the detectives to that effect are incredible and not worthy of belief." The Trial Court herein consistent with the law as cited herein made the same factual and legal determination herein:

> There's no question at that point based on all there things on the totality of the circumstances the police had a right to make an arrest at that time and I seriously doubt that Mr. Messam was free to leave

> at that time so it was tantamount to a custodial setting at that particular time." (2T36-7 to 13)

The trial judge heard the testimony and had an opportunity to make legal findings and assess credibility of Detective Miller. The State relies on the same person who caused a prior indictment in this case to be dismissed because of misrepresentation before the Grand Jury. (2T4-9 to 25 to 2T5-7 to 25, Exhibit D-3). As a matter of law and question of fact the Trial Court did not believe the defendant was free to leave after the blood stained papers were found notwithstanding the assertion of the police as to their intentions with regard to the interrogation. The Trial Court said it best by so finding that:

> I Think he (Detective Miller) involved some kind of subterfuge at that point (observance of the blood stained papers) to get Mr. Messam to admit his involvement in this particular offense (2T37-10 to 12).

This type of misconduct implicitly found and cited by the Trial Court is exactly what the 4th and 6th Amendments firmly disallows and criticizes.

The findings of a trial judge should not be disturbed if they can be reached on sufficient credible evidence. State v. Johnson, 42 N.J. 146, 162 (1964). Clearly this record more than supports the trial judge's findings as to the exclusion of the defendant's statements and certain physical evidence seized.

c. The State Misperceives The Issue Raised By The Court Herein

The State in its brief continues to argue that in some way the defendant and/or the Court is charging the police with some sort of legal or constitutional error for their failure to arrest at a particular point. No one is attempting to force or compel the investigative strategy of the police as to the timing of an arrest but rather the point were is that where probable cause to arrest exists and the police choose to interrogate a suspect in de facto custody as their strategy in lien of an arrest the police must give due regard to the defendant's Fifth and Sixth Amendment rights. The police cannot employ a sham as a pseudo investigative strategy to subvert a defendants constitutional safeguards.

POINT II

THE CONSENT SEARCH EXECUTED BY THE DEFENDANT WAS ILLEGAL AND INVALID AND THE TRIAL JUDGE'S ORDER SUPPRESSING ALL ITEMS SEIZED THERETO MUST BE AFFIRMED

a. The Defendant Was Not Given An Opportunity To Evaluate The Attendant Circumstances of The Situation Prior To His Consent

It is clear that the Supreme Court of the United States in Scheckloth v. Bustamonte, 412 U.S. 218 (1975) held that a person not in custody and is the subject of a search, to justify same on a consent basis the State must demonstrate a voluntary waiver, but need not establish the subject had knowledge of his right to refuse. Our Supreme Court decided to give defendant's

broader protection as to consent searches by requiring the subject to same be specifically advised by his right not to consent. State v. Johnson, 68 N.J. 749 (1975) Johnson, supra, at 354 distinguished consent searches of persons in custody from those not by indicating where a person was not in custody the State only had to show he knew he had a choice as opposed to him being specifically advised he could refuse. A higher burden was imposed where custody situations were involved. That is important in this context, because as Point I set, out this was a custodial situation as found by the Trial Court. The defendant, therefore, was entitled to the higher burden imposed upon the State. The Trial Court as did the Court in Johnson, supra at 355 found that "a choice involves the evaluation of the available options". This knowledge may be imputed by information supplied by the police. In this case the defendant was mislead as to the reason he was at the police station and never told of his true position.

Judge Schreiber in his concurring opinion in Johnson supra at 356 also indicated *Miranda* warnings were not required for it was a non-custodial setting. Conversely it would appear they would be required where a custodial situation were involved as here. This would also cause the search to fail because of the failure of the police to give Miranda warnings.

It is doubtful given the instant record the consent given herein could be said to be "freely, understandingly, and unequivocally given". State v. Bindhammer, 44 N.J. 372, 380 (1965) citing United States v. Page, 302 F. 2d 81 (9th Cir. 1962) which is required under both the State and Federal constitutions.

Appendix L

b. The Consent Given Herein Was The Product Of An Illegal Interrogation And Must Fail As Being Fruit Of The Poisonous Tree

Defendant repeats his argument of Point I as to the police being required to give Miranda warnings before their questioning at the station. The testimony of Detective Miller is important to note:

> Q So you're saying that he admits the girl's pregnant, admits he might be the father and you saw blood stained papers in his car and you know the girl was stabbed to death, you knew that already, right?
>
> A Yes.
>
> Q Adding all that up together in your own mind, you're saying prior to executing this consent to search he wasn't a suspect, right?
>
> A The blood stains in the car, the papers in the car could have been from a cut, I don't know, I don't really know. That's why I asked him about it; that's why I asked him about it.
>
> The blood stained papers I saw in the car could have been from a cut, I don't know, and this is why I questioned him about it.
>
> Q So you're saying when you searched his car even before you asked him — strike that.

Appendix L

The fact that you got him to execute S-1 and when you searched his car had nothing to do with you suspecting he may have had something to do with this crime because he wasn't a suspect, right?

A Yes, he wasn't a suspect.

Q So you were just searching his car on a whim so to speak?

A We were searching his car because he couldn't explain the spots of blood on the paper in his car. (T63-3 to 25 and T64-1 to 2)

Defendant argues the *only* basis on which Detective Miller executed this consent search was his failure to give an adequate explanation as to the origin of the blood on the papers in his car. Clearly as the Trial Court found the defendant was a suspect and was in custody prior to this interrogation requiring Miranda warnings to be given. Their failure to mirandize this defendant would bar the use of the statements or actions predicated thereon because this use would be a fruit of the poisonous tree. Here the tree is obviously the non-mirandized interrogation and the fuit being the consent search based on the information obtained therefrom. This consent search according to this record was clearly derived from an illegal interrogation requiring suppression. Wong Sun v. U.S., 371 U.S. 471 (1963); Nardone v. U.S., 232 U.S. 338 (1939); U.S. v. Cella, 568 F.2d 1266 (9th Cir. 1977)

Appendix L

POINT III

WHETHER OR NOT THE STATE HAD PROBABLE CAUSE TO SEARCH THE DEFENDANT'S CAR, A SEARCH WARRANT WAS REQUIRED IN THE INSTANT CASE

a. Point II Of The State's Brief Was Not Raised Below And Should Not Be Part Of This Appeal

The prosecutor below summarized the issues at the hearing as: 1) voluntariness; and 2) whether or not there was a custodial setting. At no time was the automobile exception raised at the hearing as a basis for the search herein. The Trial Court did not hear nor was asked to rule on this issue below. A reversal on this issue would be inappropriate. The State should not be allowed to raise this issue.

b. There Did Not Exist Any Exigent Circumstances Or Opportunity For The Defendant's Vehicle To Be Moved Prior To The Request For A Warrant

It must be kept in mind Detective Miller observed the blood stained papers when he first entered the car but obviously felt no exigency in that he did not seize them at that time. The reason for his lack of concern for any exigency was probably because (1) the defendant was with him at all times from that point; and (2) the defendant was allowed to park his vehicle in the police lot where the public cannot normally park. The defendant and Detective Miller exited the vehicle and went into police headquarters (the same building in which the Municipal Court is located) without Detective Miller retrieving the blood stained papers or searching for additional items.

Appendix L

In general, a warrantless search of a motor vehicle is justifiable under the automobile exception when police have probable cause to believe that the vehicle contains contraband or evidence of criminal activity. State v. Martin, 187 N.J. 561, 567 (1981); Chambers v. Maroney, 399 U.S. 42 (1970); Texas v. White 423 U.S. 67 (1975); and Carroll v. U.S., 267 U.S. 132 (1925). This exception applies where parked and unoccupied vehicles encountered by police are on public parking lots or on city streets and also to moving vehicles stopped on open highways. State v. LaPorte, 62 N.J. 312 (1973); State v. Martin, supra at 567. The State fails to acknowledge this criteria as to the applicability of the automobile exception. In every case cited by the State the car was either parked or unoccupied on a public lot or city street when encountered by the police (State v. Martin, State v. McCarthy) or a moving vehicle stopped on the open highway (Chambers v. Maroney, State v. Alston, State v. Guerra, State v. McCarthy, State v. Esteves, State v. Waltz, State v. Kahlon).

The linch pin in determining whether or not a warrant should have been sought herein with regard to automobile searches of this type was clearly spelled out by the Supreme Court in State v. Ercolano, 79 N.J. 25, 46 wherein it teaches:

> In other words reading Coolidge, Carroll and Chambers together, the key to the exception from the warrant requirement lies in the mobility of the vehicle and the impracticality of previously obtaining a warrant under the circumstances then obtaining.

The facts herein clearly establish the car was in the nonpublic police parking lot with the defendant at all times in their presence, after they observed the blood stained papers. The record also

should note that clearly given the location of the police station to the Municipal Court seeking a warrant was not impractical while all parties were at the police station.

Lastly, clearly no exigency was a factor in that the police had observed the blood stained papers in the car and chose to exit the vehicle, and leave them there until after they questioned the defendant in the police station. Obviously the car was believed to be safe and secure in the police parking lot.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that this Court deny leave to appeal an in the affirmative affirm the Trial Court Order of Suppression.

Respectfully submitted,

s/ Robert L. Brown
ROBERT L. BROWN

DATED: December 23, 1986

APPENDIX M — EXCERPTED TRANSCRIPT

[Commencing at page 46]

Daye - redirect

. . . message, did she explain to you what she meant by that?

A. No.

MR. BROWN: I have no further questions, Judge.

MR. BOGDANSKI: Nothing further.

THE COURT: Thank you, Ms. Daye, you can step down.

THE WITNESS: Thank you.

BEVERLY JONES, Sworn.

DIRECT EXAMINATION

BY MR. BOGDANSKI:

Q. Ms. Jones, I'd like to remind you to keep your voice nice and loud so everybody can here you, okay.

A. Okay.

Q. I want to ask you, were you related to Rhonda Daye?

A. Yes, I was.

Q. How were you related to her, Ma'am?

A. She was my first cousin.

Q. And did you see her and socialize with her before she died, Ma'am?

A. Yes, I did.

Q. Did she ever introduce you to anyone before the time she died as her boy friend anywhere?

[47] Jones - direct

A. Yes, she did.

Q. Do you see the person she introduced you to in court today?

A. Yes, I do.

Q. Will you point him out for us, please —

THE COURT: What is he wearing today, Ma'am?

A. A suit.

THE COURT: What color is it?

A. Grey.

THE COURT: Indicating the defendant for the record.

Appendix M

BY MR. BOGDANSKI:

Q. Ma'am, where were you when Rhonda introduced you to her boy friend?

MR. BROWN: I'm going to object to the characterization "boy friend," Judge.

THE COURT: Well, it's already testified that's what she introduced him as. She has already testified.

I will permit it.

Q. Where did she introduce you to her boy friend at?

A. It was at the Subway Shop.

[48] Q. And at that time, do you know whether or not she was pregnant?

A. No, I did not.

Q. Did you later, at some point, find out that she was pregnant?

A. Yes, I did.

MR. BROWN: Judge, I object to that without a foundation.

THE COURT: Mr. Bogdanski, find out how. Ask her how she found out.

Appendix M

Q. How did you find out that Rhonda was pregnant?

A. She told me.

Q. And did she tell you who the father of the baby was?

A. Yes, she did.

Q. Who did she say it was?

A. Loyd.

Q. And that's the person you have identified as the defendant.

A. Un-huh.

Q. You have to say yes or no, Ma'am.

A. Yes.

Q. Now when you went to the sandwich shop and [49] she introduced Loyd as her boyfriend, do you remember — strike that.

Did Rhonda ever tell you whether or not she wanted to have the baby?

A. Yes.

Q. And what did she tell you?

A. She said she wanted it.

Q. And at some point in time, do you know whether or not she had to stop working because of her pregnancy?

MR. BROWN: Judge, I object to the last portion because it's leading.

THE COURT: Well, okay. Why don't we say at what time did she stop working, if she knows. You don't have any object to that, I assume?

MR. BROWN: No.

Q. Do you know whether or not at what time she stopped working?

A. No, I don't.

Q. Did you know whether or not Loyd was married?

A. Yes, I did.

Q. And was he married?

MR. BROWN: I object, without foundation, Judge.

[50] Q. Okay. How did you know that?

A. She had mentioned to me one time that he was married.

Q. Did Rhonda ever tell you how she got her apartment above the Subway?

A. Yes.

Q. Who got the apartment for her, if you know?

MR. BROWN: Judge, I'm going to object to this line in terms of hearsay in this particular area. This, obviously, is not harmless at this point.

THE COURT: Side bar, Counsellor.

(The following occurs at side bar:)

THE COURT: Can I have an offer here? Where are we going? Half this case is hearsay.

MR. BOGDANSKI: Her statement will be that Rhonda told her that Loyd got the apartment for her. She will say that Rhonda told her that Loyd got the apartment for her. It's the position of the State that the relationship between the parties is something in issue. Counsel asked many questions of the last witness about what did Rhonda tell you.

THE COURT: I understand that.

MR. BOGDANSKI: Counsel's opening was, they all knew this because Rhonda told them. It would seem [51] that's in issue, number one, and number two, it's somthing that was told to her by the decedent.

MR. BROWN: Judge, my concern is that, frankly speaking, some of these answers may be predicated on not just the statement that Rhonda is making but other information that was recounted to her.

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THE COURT: If that becomes a problem, I can understand that but I would certainly think Rhonda would be in a position to know how she got the apartment and since most of the information gleaned her is what Rhonda said, both of you are relying on that to establish the relationship between the parties. If that is the answer I will permit it.

(End side bar.)

Q. Did Rhonda herself tell you how she got the apartment?

A. Yes, she did.

Q. What did Rhonda tell you?

A. She told me her boy friend, Loyd, had got the apartment for her.

MR. BOGDANSKI: I have no further questions of this witness.

THE COURT: Mr. Brown.

MR. BROWN: Thank you, Judge.

[52] Jones - cross

CROSS EXAMINATION

BY MR. BROWN:

Q. Ms. Jones, on how many occasions had you seen Loyd?

A. Just once.

Appendix M

Q. You only saw him one time?

A. Un-huh.

Q. Is that the ony time you ever had occasion to talk to him?

A. That was the only — I didn't talk to him that time.

Q. Basically, she just introduced you to him. You said hi, he said hi. That, basically, is it?

A. That was it.

Q. Would it be fair to say you didn't know anything about the relationship between Loyd and Rhonda other than what Rhonda had told you?

A. Yes.

Q. Do you know the names of any of the other fellows that Rhonda went out back during that period of time?

A. During that time I didn't know she was going out with anybody else.

Q. Did you know anybody else that she had gone out with?

[53] A. That she had gone out with?

Q. Yes.

A. Yes, I did.

Appendix M

Q. Can you give us the names of some of those people, if you know.

A. I only knew one, and his name was Jamal.

Q. Now, do you recall Rhonda telling you on one occasion in which she attacked Loyd?

A. Do you want to repeat that? I didn't quite get it.

Q. Let me ask you a different way.

Do you remember Rhonda telling you about her striking Loyd in the face with a brick?

A. Yes, I remember her telling me something about it.

Q. Do you — are you aware that Rhonda lost her job at the Sandwich Shop?

A. I knew that she had later. I found out she had stopped working. I didn't know whether she had got fired or what. I didn't know what happened.

Q. Did she ever discuss any of the fights, or anything, that she had with employees at the Sandwich Shop?

A. No, she told me she had got into it with Loyd because he tried to stop her from drawing unemployment, or [54] something like that.

Q. And because he did that, she struck him in the face with a brick?

A. I'm not saying that's why she hit him with the brick.

Appendix M

Q. Had you ever been to Rhonda's apartment?

A. No, I had not.

Q. Had you ever been to the place that she stayed before the apartment over the Subway Shop?

A. Yes, I had been to another apartment that she had stayed in.

Q. And where was that apartment?

A. I don't know the street.

Q. What kind of apartment was it?

A. It was a yellow house. I believe it was yellow, I am not sure.

Q. Do you remember what floor she lived on in the yellow house?

A. No, I don't, because that was awhile — I mean, that was a long time ago, no, I don't remember, and I had only been there once.

Q. Well, when you say "it was a long time ago," this happend back in September, 1984, okay?

How much time before September 1984 had it been [55] that you visited her at this yellow house?

A. I don't know.

Q. Would it have been a year before?

A. I'm not sure.

Q. Okay. The house that you visited her at, what kind of apartment, what kind of apartment did she have? Do you know how many rooms was it?

A. I believe it was just one room.

Q. One room. You don't remember what floor?

A. I believe it was the second but I'm still not sure.

MR. BROWN: I have no further questions, Judge.

MR. BOGDANSKI: Just one.

REDIRECT EXAMINATION

BY MR. BOGDANSKI:

Q. When Rhonda spoke to you about the argument she had with Loyd about the brick, will you tell us what Rhonda told you about that.

A. She asked me something about — she had said something about he didn't sign something for her to get her unemployment, or something like that, and he was upset due to the fact she was pregnant and that she wanted to have the baby and she said that that's when [56] she got into the argument with him and she hit him with the brick and he said something about she wasn't going to —

MR. BROWN: I object, Judge, about what he said. This is third — fourth party hearsay.

MR. BOGDANSKI: Judge, counsel asked about this. He opened the door.

MR. BROWN: I didn't ask about anything that anybody said other than Rhonda.

THE COURT: You asked about what the fight was about and what Rhonda allegedly struck Mr. Messam with. I will permit it.

Q. You may continue with what Rhonda told you about the brick.

A. (continuing) - And she told me that Loyd said she wasn't going to have the baby, that he'd get rid of her and the baby one way or the other.

MR. BOGDANSKI: I have no further questions.

RECROSS EXAMINATION

BY MR. BROWN:

Q. Did you tell me who was present when this statement was made?

A. Just me and her.

[57] Q. So you were then when he said that?

A. Excuse me?

Appendix M

Q. Would you tell me who was present at the time that the defendant made the statement that you just testified about.

A. I wasn't there when he said it.

Q. You weren't there. So what you're testifying to is what Rhonda told you that the defendant told her, right?

A. Yes.

Q. So, basically, you're testifying about third or fourth party hearsay — he says, she says —

A. No. I'm testifying to what she told me.

Q. That somebody else said, right?

A. What he said, right.

Q. Do you know when this was said?

A. No, I don't know.

Q. Do you know where this was said?

A. No.

Q. Do you know how this was said?

A. I guess he just said it to her.

Q. But the answer to my question is you don't know when, where or how it was said, right?

A. All I know is what she told me.

[58] MR. BROWN: I have no further questions, sir.

MR. BOGDANSKI: I have no further questions.

THE COURT: Thank you, Ms. Jones.

MR. BOGDANSKI: Thank you, Ma'am.

THE COURT: Ladies and gentlemen, I have almost five minutes to 4. We are going to release you at this time and see you back here at 9 o'clock tomorrow.

We should be able to continue at that time. We are moving fairly well. I expect to do that tomorrow also. Also, it's very important that I remind you of a couple of things. I mentioned newspapers before and I think there may be something about this in the paper, so, please, be very careful not to read anything about it. You might have somebody in the family look through the paper. I am not saying, don't read the paper, but maybe have somebody check it out and if they see something in it, make sure you don't read that section. The reason is, you have to decide this case, solely, on what you hear in the courtroom. We don't want anything to influence you; and sometimes the reporter's account of it is not absolutely correct. So, please, don't discuss the case with anybody else or among yourselves,

APPENDIX N — POLICE STATEMENT FORM OF BEVERLY JONES DATED SEPTEMBER 25, 1984

POLICE DEPARTMENT **NEWARK, N.J.**

STATEMENT FORM

DATE: September 25, 1984

CENTRAL COMPLAINT NO.: 53784

VOLUNTARY STATEMENT OF: Beverly Jones

RESIDENCE: 19 North 17th Street, East Orange, New Jersey

OCCUPATION: Homemaker 11-7-'64 ss# 154-44-9434
AGE: 19Yrs.

STATEMENT MADE TO: Detectives Charles Whitner & Gary Miller 22 Franklin Street Newark, New Jersey

Statement started at 1725Hrs.

1.q. What is your full name

a. Beverly Jones

2.q. How long have you lived at your prsent address

a. About a year and a half maybe two years

3.q. With whom do you live

a. My mother, Evelyn Jones

Appendix N

4.q. Can you read, write and understand the english language

a. Yes

5.q. What grade did you complete in school

a. The 11th grade

6.q. Who accompanied you to my office today

a. My mother

7.q. I am Detective Charles Whitner, of the Newark Police Department Homicide Squad do you understand this

a. Yes

8.q. I am investigating the homicide of Ronda Daye. Will you answer my questions truthfully and to the best of your knowledge

a. Yes

9.q. What relationship was Ronda Daye, to you

a. My first cousin

10.q. When was the last time you saw your cousin, Ronda Daye

a. I think it was August 7, 1984, she would call me offent

Appendix N

11.q. What can you tell me about the death of Ronda Daye

a. I know that she was having a baby for this fellow named Lloyd, I know that Lloyd, did not want her to have the baby.

12.q. Who is Lloyd, and what is his full name

a. Ronda, told me that he owned the Subway Shop which is under the building where she live Lloyd, is a Jamaican, he looks like he is in his late 30's.

13.q. Have you ever saw Lloyd

a. Yes, one time. Ronda, introduced me to him in the Subway Shop

14.q. How do you know that Ronda Daye, was having a baby for his Lloyd

a. Ronda, had told me

15.q. Tell me about the conversations you had with Ronda Daye, about her being pregnant

a. When Ronda, first told me that she was pregnant she said that Lloyd, had told her that he would surport the baby but not her. Then in August Ronda, told me that Lloyd, wants her to have an abortion. Ronda, told me that she had told Lloyd, that she was not going to have an abortion, she was going to keep the baby. Ronda, told me that Lloyd had told her that she was going to have an abortion, that he would get the baby out of her one way or another.

Appendix N

16.q. What did Lloyd, mean when he told Ronda, that he would get the baby out of her one way or another

a. Ronda, told me that he meant it as a threat

17.q. To you knowledge how long had Ronda Daye, been seeing Lloyd

a. I don't know. I do know that Lloyd, is married

18.q. How do you know that Lloyd, is married

a. Ronda, had told me, Ronda, also told me that Lloyd, had a lot of money

19.q. Do you know how Ronda Daye, met Lloyd

a. Yes, Ronda, worked for him at the Subway Shop, on Sussex Avenue

20.q. What is the Subway Shop

a. Its a restaurant

21.q. Would you describe Lloyd for me

a. Dark skin, he talks with an accent

22.q. Had Ronda Daye, told you of any assaults that Lloyd, had committed on her

a. Yes, she told me about fights that her and Lloyd, had. She told me that one time during a fight she had hit Lloyd, in the face with a brick

Appendix N

23.q. Did Ronda Daye, ever talk to you about her apartment and how she got it

a. Yes, she told me that Lloyd, had got the apartment for her

24.q. Was this statement the truth to the best of your knowledge

a. Yes

25.q. Is there anything further you can add to this statement

a. Only that I had talked to Ronda, on the phone about two weeks ago. Thats when she told me that she and Lloyd, had a fight and that she had hit him in the face with a brick.

26.q. After reading this statement will you sign it freely

a. Yes

27.q. Do you believe in God

a. Yes

SWORN TO AND SUBSCRIBED BEFORE ME THIS

25 DAY OF Sept, 1984 — s/ Beverly Jones
s/ Lt. illegible — SIGNATURE

APPENDIX O — BIOCHEMISTRY LABORATORY REPORT

[Omitted here but submitted separately as Lodging Appendix]

Supreme Court, U.S.
FILED
MAR 19 1998
CLERK

(2)

No. 97-1351

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

GLADSTONE MESSAM,

Petitioner,

vs.

WILLIS MORTON, SUPERINTENDENT OF THE NEW JERSEY STATE PRISON, AND THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether petitioner is barred from raising for the first time in his petition for certiorari the issues of whether a state appellate court's findings regarding what arguments counsel had made are entitled to a presumption of correctness and whether, under certain circumstances, Miranda warnings are a prerequisite to the validity of a consent to search?

2) Whether trial counsel was ineffective for not asserting a frivolous motion to suppress statements petitioner had made in response to open-ended, general investigatory questions when he was not in custody and admission of the statements furthered the defense that the police had targeted petitioner?

3) Whether Miranda warnings are ever an absolute indispensable prerequisite to finding that an accused's consent to a search is voluntary when an accused's consent to a search is not an incriminatory statement and can only reveal physical, not testimonial, evidence?

4) Whether the Court of Appeals for the Third Circuit correctly interpreted the record which disclosed petitioner's motive for killing the victim and physical evidence which linked petitioner to the murder?

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(MESSAM.TC/barbarar)

BRIEF ON BEHALF OF THE RESPONDENTS IN OPPOSITION

Respondents, Willis E. Morton, Superintendent of the New Jersey State Prison, and the Attorney General of the State of New Jersey respectfully request that this Court deny the petition for writ of certiorari filed by the petitioner, Gladstone Messam, seeking review of the decision of the United States Court of Appeals for the Third Circuit (Third Circuit) that was filed on November 19, 1997.

-------*-------

COUNTER-STATEMENT OF THE CASE

Solely to prevent his wife from discovering that he had an affair with his 20-year-old employee, Rhonda Daye (Rhonda), and had fathered her unborn child, petitioner made good on his threat to "get rid of her and the baby one way or the other" and butchered the 4 months pregnant Rhonda to death by stabbing her a total of 31 times. Seven courts, including the Third Circuit, have either explicitly or

implicitly held that petitioner has failed to establish his ineffective assistance of counsel claim.

I. Factual Background

Petitioner, a married man with two children, owned a Subway sandwich shop in Newark, New Jersey and a Big Bite sandwich shop in Orange, New Jersey. Rhonda worked as a sandwich maker in these shops and lived in an apartment, which was rented by petitioner's brother, above the Subway.

Petitioner and Rhonda were having an affair. In April, 1984, Rhonda became pregnant by petitioner. Rhonda wanted to have the baby. Petitioner, however, "was upset due to the fact that {Rhonda} was pregnant and that she wanted to have the baby." In July, 1984, Rhonda had to stop working because of medical problems caused by her pregnancy.

When petitioner rebuffed Rhonda's plea for money for necessities, Mary Daye, Rhonda's mother, telephoned petitioner and asked him to "help{}" Rhonda because Mary Daye "didn't have the money to buy the food and stuff

that {Rhonda} needed." Petitioner told Mary Daye that "he didn't have any money and all he could give her was bread..."

Also, petitioner refused to sign paperwork to enable Rhonda to obtain unemployment benefits. Then, petitioner and Rhonda had a fight or "got into it." Rhonda hit petitioner with a brick. Upset that Rhonda wanted the baby, petitioner told Rhonda that "he'd get rid of her and the baby one way or the other." On September 17, 1984, petitioner again refused to give Rhonda money after he had promised to do so. Petitioner and Rhonda "had a big fight," after which Rhonda thought petitioner "got the message."

On Monday, September 24, 1984, Detective Gary Miller of the Newark Police Department's Homicide Squad responded to a call at 85 South Orange Avenue. Upon entering the abandoned building located there, Detective Miller saw Rhonda's dead body, nude from the waist up. She had been stabbed 31 times in the chest and neck. There were also cuts on her face

and hands. Rhonda's body was lying on "the inside of the inner wall of the window sill" of a window. Detective Miller observed "drippings" of blood on the window sill.

Outside, Detective Miller observed a trail of blood from the curbside to the window sill. In the immediate vicinity of the building, Detective Miller saw a bloodstained envelope and 3 bloodstained paper invoices, all bearing the words "Subway Sandwich Shop." Other items discovered by the detective in this area included a bloodstained red and white box with popcorn, a bloodstained green comb, a bloodstained Tropicana orange juice box and a bloodstained tire.

On September 25, 1984, Mary Daye went to the Subway sandwich shop to find Rhonda. She saw petitioner who told Mary Daye that he had not seen Rhonda since Saturday. Mary Daye immediately thereafter saw two detectives and reported that her daughter was missing. Mary Daye was taken to police headquarters and saw Detective Miller. Mary Daye took Detective Miller to Rhonda's apartment.

A torn note was found in the garbage bag underneath the kitchen sink. When pieced together, this note, in relevant part, read:

> Dear Pearl {petitioner's wife}, {P}lease understand I never meant to hurt you. I am sorry. ...Well, Ms. Messam, I had an affair with your husband. Please I regret it now. ...Ms. Messam, I am pregnant by your husband. I am sorry. He promised me happiness and peace of mind. ...{N}ow he treats me like a complete stranger and won't help me get anything to eat and to feed my unborn baby. ...To find who I am, come to the Subway or ask your husband.

Inside Rhonda's bedroom, Detective Miller found a half-finished note to Mrs. Messam in a notebook with petitioner's address on the inside cover. Recovered from Rhonda's wallet were materials from a prenatal center and an envelope from unemployment. Mary Daye then identified Rhonda's body. Police interviews with Mary Daye and Rhonda's cousin, Beverly Jones, corroborated that Rhonda was pregnant and petitioner wanted Rhonda to abort the child.

Detective Miller and his partner went to the Subway store to interview petitioner. Detective Miller told petitioner that "Rhonda Daye was missing and we wanted to talk to him." Detective Miller also told petitioner that Rhonda had been last seen on Friday.

When asked by the detectives, petitioner agreed to go to police headquarters to provide a statement. Petitioner proposed to drive himself to headquarters in his 1982 Honda, but agreed that Detective Miller could ride with him.

Before either one entered, petitioner moved a pile of papers from the passenger side front seat to the back seat of the car. Detective Miller saw bloodstains on the papers which were on top of the pile.

At the police station, Detective Miller questioned petitioner without advising him of his Miranda rights. Petitioner disclosed that he had last seen Rhonda the previous Friday and that Rhonda had worked at his sandwich shops but no longer did because she was

pregnant. Petitioner revealed to Detective Miller that Rhonda was "just a friend." Petitioner acknowledged that Rhonda had told him that he was the "father of her child."

Detective Miller asked petitioner about "the bloodstained papers in the car." Petitioner answered that he "didn't know about them," but admitted that nobody else had used the Honda since the previous Thursday, September 20, 1984. Detective Miller then asked for permission to search the Honda. Petitioner, who is college-educated, read a consent to search form, listened to the detective read it aloud, then signed it.

Detective Miller's search of the Honda produced 12 pieces of bloodstained paper and 2 bloodstained coffee mugs, one of which had popcorn inside of it. Detective Miller also noticed small spots of blood on the passenger side tire, the passenger side door, the front fender and the hood. A notebook containing an unfinished letter from Rhonda to Mrs. Messam was found in the trunk.

After the search, Detective Miller noticed blood stains on the brush tan leather work boots petitioner was wearing. Detective Miller then advised petitioner of his Miranda rights. When the detective asked petitioner from where the blood stains on his boots came, petitioner told him that he "didn't want to talk anymore."

Forensic testing revealed the presence of two enzymes differentiating the victim's blood from that of petitioner. The blood on the mug which did not contain the popcorn, 2 envelopes and 1 paper found in petitioner's car and 1 envelope and 1 paper recovered from the scene was consistent with Rhonda's blood but inconsistent with petitioner's blood. Blood with this combination of enzymes occurs in only 3.8% of the black population. Rhonda was black.

II. Procedural History

On the State's interlocutory appeal of the order entered by the state trial court which suppressed all evidence which was not in plain view, the state Appellate Division, on

February 13, 1987, reversed the trial court's order. The Appellate Division held that petitioner had voluntarily consented to the search of his car, thus all evidence recovered from petitioner's vehicle was admissible.

The jury found petitioner guilty of murdering Rhonda and related weapons offenses on January 13, 1989. Petitioner was sentenced to life imprisonment with a 30 year parole disqualifier.

Petitioner unsuccessfully appealed his convictions through the state court system. His attempt to disturb his convictions on collateral review in the state courts was equally unavailing. Petitioner then unsuccessfully applied to the United States District Court for a writ of habeas corpus.

The District Court issued a certificate of appealability even though its July 31, 1996 opinion did not hint that any of petitioner's claims was the least bit meritorious. Before the Third Circuit, petitioner argued that his trial attorney was ineffective for the following reasons:

he did not adequately argue the suppression motion, failed to move to suppress the statements petitioner had made at the stationhouse and improperly elicited hearsay testimony. On November 19, 1997, the Third Circuit issued an opinion affirming the District Court's denial of petitioner's application for a writ of habeas corpus.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE STATE COURT FINDINGS REGARDING MATTERS APPARENT FROM THE RECORD ARE NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS AND PETITIONER'S EXPERIENCED TRIAL COUNSEL WAS EFFECTIVE AND PACKAGED A COHERENT DEFENSE CENTERING ON THE POLICE'S ALLEGED WILLINGNESS TO GO TO ANY LENGTHS TO PIN THIS MURDER ON PETITIONER

I. Summary of Argument

"The likelihood of success of a motion {or argument} ...is directly relevant to the question of whether the failure to make it constitutes inadequate assistance of counsel." United States v. Madewell, 917 F.2d 301, 304 (7th Cir. 1990). Petitioner's experienced and respected attorney,

whom the trial judge described as "very competent," was not required to assert factors which had no capacity to vitiate the voluntariness of petitioner's consent to the search of his car nor file a spurious motion to suppress statements petitioner made when he was not subjected to interrogation nor in custody.

Admission of the petitioner's stationhouse statements furthered the defense that the police were so bent on targeting petitioner that they would manufacture just about anything to get him. Admission of the hearsay statement about Rhonda hitting petitioner with a brick advanced petitioner's counsel's attempt to portray this otherwise sympathetic victim in an unsympathetic light. "{C}ourts will not find that an attorney is incompetent for using a particular approach to a case so long as that approach was reasonable." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994), cert. den., 513 U.S. 1022 (1994). Petitioner is barred from now raising for the first time

that the presumption of correctness attaches to a state court's findings as to what arguments counsel had made and that, under certain circumstances, Miranda warnings are a prerequisite to a valid consent to search.

II. The presumption of correctness does not attach to a state court's findings as to what arguments counsel had made.

This Court generally "refrain{s} from addressing issues not raised in the Court of Appeals." Equal Employment Opportunity Commission v. Federal Labor Relations Authority, 476 U.S. 19, 24 (1986); Holly Farms Corporation v. National Labor Relations Board, ____ U.S. ____, 116 S.Ct. 1396, 1402, n.7 (1996). Petitioner now alleges that the state Appellate Division's finding on interlocutory appeal that petitioner's lawyer only presented the absence of Miranda warnings to support his claim that petitioner's consent to the search was involuntary should be presumed to be correct. Petitioner had never asserted this argument before the Third Circuit or any other court. As

such, petitioner should be barred from raising this argument for the first time before this Court.

The presumption of correctness only attaches to a state court's factual finding whose "resolution depends heavily on the trial court's appraisal of witness credibility and demeanor." Thompson v. Keohane, ____ U.S. ____, 116 S.Ct. 457, 465 (1995). As was stated in Miller v. Fenton, 474 U.S. 104, 114 (1985), a "state trial judge is in a position to assess {credibility and demeanor} that is far superior to that of federal judges reviewing an application for a writ of habeas corpus."

In stark contrast, the determination of what arguments counsel had made in support of petitioner's suppression motion is not "peculiarly within a trial judge's province." Wainwright v. Witt, 469 U.S. 412, 428 (1985). A federal court collaterally reviewing petitioner's case can discern what arguments counsel had proffered in support of a motion by simply reviewing the record.

As the Third Circuit observed, "{T}he district court correctly noted that {petitioner's lawyer} specifically argued to the Appellate Division that Mr. Messam was in custody, that he should have been given Miranda warnings, and that the police misled him as to the reason he was at the police station." It is doubtful that three judges of the Third Circuit as well as the District Court judge misapprehended the record.

Petitioner contends that the Court of Appeals's failure to accept the finding regarding what arguments petitioner's attorney had advanced prevented it from deciding the ultimate issue of whether or not counsel provided ineffective assistance. This argument overlooks that no other factor besides those alleged by petitioner's lawyer conceivably bore on the voluntariness of the consent given by this savvy, college-educated, 39-year-old petitioner who voluntarily went to police headquarters, was advised of his right to refuse consent and was not threatened or coerced in any manner.

Petitioner was twice explicitly told that he could refuse to consent to the search of his car. This is strong evidence of the voluntariness of petitioner's consent. United States v. Mendenhall, 446 U.S. 544, 558 (1980). The police only sporadically questioned petitioner at the police station before asking for his consent to search. There is not a shred of proof that petitioner had been coerced. Petitioner's voluntary decision to go to police headquarters highlights that the police did not in any way threaten him. Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

The police's failure to inform petitioner that Rhonda had died does not constitute deception. As the Third Circuit explained, "While police deception can be a factor indicating coercion, the police are not required to inform a suspect of the full extent of their knowledge or investigation."

New Jersey courts have traditionally afforded criminal defendants more protection than the federal courts in the area of search

and seizure. In the context of consent searches, New Jersey courts have held that an accused's consent to a search is involuntary if he is not advised of his right to withhold consent. State v. Johnson, 68 N.J. 349 (1975). As such, it was reasonable for petitioner's lawyer to try to make new law and stress that Miranda warnings are required under New Jersey law before a consent to search given in an allegedly custodial setting can be held to be voluntary.

III. Miranda warnings are not a prerequisite to a valid consent to search because such consent does not implicate the right against self-incrimination.

Petitioner alleges that, since he was in custody and subjected to interrogation, Miranda warnings were required to render his consent to the search voluntary. This argument not only misconstrues case law but is diametrically opposed to petitioner's claim that counsel was ineffective for only asserting the absence of Miranda warnings in support of his motion to

suppress the fruits of petitioner's allegedly involuntary consent to search. Petitioner never raised this argument before, thus he is barred from asserting it now for the first time.

Miranda warnings are not an indispensable prerequisite to a valid consent to search. Hubbard v. Jeffes, 653 F.2d 99, 103-104 (3rd Cir. 1981); United States v. Ritter, 752 F.2d 435, 438-439 (9th Cir. 1985). As was explained in Cody v. Solem, 755 F.2d 1323, 1330 (8th Cir. 1985), cert. den., 474 U.S. 833 (1985):

> "{T}he fifth amendment right to counsel is not an independent right; rather it stems from the privilege against self-incrimination." Simply put, a consent to search is not an incriminating statement. Cody's consent, in and of itself, is not evidence which tends to incriminate him. While the search taken pursuant to that consent disclosed incriminating evidence, this evidence is real and physical, not testimonial. {citations omitted}

An accused's consent to a search remains non-testimonial even when he

provides said consent while he is in custody.

Petitioner overlooks that Miranda simply did not apply. The general, open-ended investigatory questions the police asked petitioner did not amount to interrogation. Police are permitted to ask a suspect "a few brief questions designed to confirm or alleviate their suspicions" without informing him of his Miranda rights. United States v. Gale, 952 F.2d 1412, 1416 (D.C. Cir. 1992), cert. den., 503 U.S. 923 (1992); Florida v. Royer, 460 U.S. 491, 497 (1983). "{T}he mere fact that a police officer may be aware that there is a 'possibility' that a suspect may make an incriminating statement is insufficient to establish the functional equivalent of interrogation." United States v. Taylor, 985 F.2d 3, 8 (1st Cir. 1993), cert. den., 508 U.S. 944 (1993).

After asking petitioner "where the blood stains came from," Detective Miller questioned petitioner whether "anyone else used his car or drove his car ...since last Thursday." Petitioner

answered, "{N}o." Detective Miller's questions did not "center blameworthiness on the {petitioner}." State v. Barnes, 54 N.J. 1, 6 (1969), cert. den. 396 U.S. 1029 (1970).

Petitioner was not in custody at the time he disclosed that no one else had used or driven the Honda since September 20, the Thursday before Rhonda's death. Petitioner's freedom of action was not curtailed to a degree associated with formal arrest. California v. Beheler, 463 U.S. 1121, 1125 (1983). There was absolutely nothing about the words or conduct of the police which would have led petitioner to reasonably believe that he was not free to leave or ignore the detective's queries and "go about his business." Florida v. Bostick, 501 U.S. 429, 434 (1991). Petitioner had not been restrained in any way. There is not a scintilla of evidence that the police intimidated petitioner or ever displayed force.

Petitioner's voluntary decision to go to police headquarters speaks volumes for a finding of non-custody.

Yount v. Patton, 710 F.2d 956, 961 (3rd Cir. 1983), rev'd on other grounds, 467 U.S. 1025 (1984); Mathiason, supra at 492. Likewise, petitioner's recommendation that he drive his Honda to the police station and voluntary decision to permit Detective Miller to drive with him bespeaks of a petitioner who was fully in control of the situation.

Admission of petitioner's statements furthered the defense that the police would go to any lengths to pin this murder on petitioner. Defense counsel packaged the evidence into the themes of sloppy police work and Detective Miller's alleged willingness to lie. Petitioner's attorney in his summation called the police investigation a "tragedy." He emphasized that petitioner's wife, petitioner's brother and the allegedly undesirable "low-lives" with whom the victim associated were never investigated. Petitioner's lawyer stressed, "There are too many people and motives and suspects that nobody did anything about..."

Counsel hammered away at the theme that Detective Miller "lied to everybody" and urged the jury during his closing argument, "The big question for you is ...did he lie to you?" Petitioner's attorney's goal was to put Detective Miller and the victim on trial. He was not merely attempting to poke holes in the State's case but attempted to shift the focus of the trial from petitioner to the victim and Detective Miller.

IV. The Court of Appeals's ruling that petitioner suffered no prejudice was based on a correct interpretation of the record which disclosed petitioner's motive to murder the victim and physical evidence linking petitioner to the murder.

Petitioner alleges that the Third Circuit's holding that petitioner was not prejudiced by any alleged ineffectiveness on the part of his trial counsel is based on a misinterpretation of the record. It is petitioner who misconstrues the record which reeks of evidence of petitioner's guilt.

The Third Circuit held that petitioner's trial attorney effectively argued the suppression motion. The Court believed it was unnecessary to express an opinion as to whether counsel's decisions to elicit hearsay and not to move to suppress petitioner's stationhouse statements constituted ineffective assistance because petitioner was not in any way prejudiced by those decisions.

During cross-examination of Ms. Jones, Rhonda's cousin, defense counsel asked her about Rhonda hitting petitioner with a brick. Ms. Jones, on re-direct examination, testified about the fight and was allowed to reveal, over the objection of petitioner's lawyer, that "-And Rhonda told me that {petitioner} said she wasn't going to have the baby, that he'd get rid of her and the baby one way or the other."

The brick incident "dirties up" the victim and tied in with petitioner's attorney's attempt to portray the otherwise sympathetic victim in an unsympathetic light. It is consistent with the defense theme

that the alleged "low-lives" with whom the victim associated may have killed her. The hearsay also showed petitioner's peaceful reaction to violence. He responded to physical force with words, not violence. It is even questionable whether counsel could have anticipated that admission of evidence of the brick incident would have "opened the door" to the admission of petitioner's verbal threat because it is unclear how much time elapsed between the brick incident and petitioner making the verbal threat.

Even if the jury had not considered the bloodied items recovered from the Honda which were not in plain view, petitioner's stationhouse comments and the hearsay, the Third Circuit held that the State "would have nevertheless presented the jury with substantial evidence of Mr. Messam's guilt." The jury still would have received petitioner's trial testimony that he had an affair with Rhonda and that Rhonda claimed the child was his. Also, the jury would have heard petitioner's trial testimony that his

wife had suspected him of having an affair with Rhonda and they had fought about it "several times." Additionally, the jury would have had the following evidence for its consideration: 1) Rhonda's notes, 2) petitioner's refusal to help Rhonda, 3) expert testimony that the blood on petitioner's work boots was of human origin, 4) bloodstained papers bearing the name "Subway Sandwich Shop" that were found near Rhonda's body, and 5) "expert testimony that {Rhonda} was not killed at the vacant building but rather killed elsewhere in a brutal confrontation, dragged to the vacant building, and dumped through the window (suggesting that Mrs. Messam could not have been the killer)."

Petitioner incorrectly asserts that only the blood recovered from the coffee mug linked him to the murder. Blood from 3 envelopes and 2 papers additionally tested consistently with the victim's blood but inconsistently with petitioner's blood. In sum, other evidence which winds a golden thread of guilt around petitioner would have been

admitted even if counsel had made different strategic decisions.

CONCLUSION

It is unjust to microscopically examine defense counsel's actions years after conviction, then nitpick his decisions and elevate any phantom error into a constitutional violation impairing the trial's fairness. As was explained in State v. White, 260 N.J.Super. 531, 540 (App. Div. 1992), certif. den., 133 N.J. 436 (1993):

> It would tear at the very roots of trial counsel's responsibility were we to routinely question the soundness of strategic decisions long after they were made. An attorney's strategic and tactical determinations must have consequences. If such decisions can later be challenged by a disgruntled litigant and a reversal obtained, trial counsel will have little motivation to carefully consider the alternative courses he or she may take. Indeed, the client, and derivatively the attorney, may ultimately derive a benefit by virtue of a tactical blunder.

"Every book must have its final chapter. This saga too must end." Id. at 591. Petitioner's own epic, authored by his own handiwork the day he senselessly butchered Rhonda to death, must also end. Respondents respectfully request that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

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